

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF VERMONT

UNITED STATES OF AMERICA	)	CRIMINAL ACTION NO.
	)	2:21-cr-113-1
v.	)	
	)	
LAWRENCE JACKSON,	)	
Defendant.	)	

MOTIONS *IN LIMINE*  
Friday, April 5, 2024  
Burlington, Vermont

BEFORE:

THE HONORABLE CHRISTINA C. REISS,  
District Judge

APPEARANCES:

JONATHAN A. OPHARDT, ESQ., and NICOLE P. CATE, ESQ., U.S.  
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570, Burlington, VT 05402-0570, Counsel for the Government

LAWRENCE JACKSON, #82536-509, Northwest State Correctional  
Facility, 3649 Lower Newton Road, Swanton, VT 05488,  
Self-Represented

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1 Friday, April 5, 2024

2 (The following was held in open court at 1:05 PM.)

3 COURTROOM DEPUTY: Your Honor, the matter before the  
4 Court is criminal case number 21-CR-113-1, United States of  
5 America v. Lawrence Jackson. Representing the Government are  
6 Assistant United States Attorneys Jonathan Ophardt and Nicole  
7 Cate; the defendant is self-represented, and Robert Behrens is  
8 here as standby counsel; and we are here for a hearing on the  
9 motions *in limine*.

10 THE COURT: Good afternoon.

11 MR. OPHARDT: Good afternoon, your Honor.

12 MS. CATE: Good afternoon, your Honor.

13 MR. BEHRENS: Good afternoon, your Honor.

14 MR. JACKSON: Good afternoon, your Honor.

15 THE COURT: So I will try to take things up in a  
16 logical order. We have a lot to discuss.

17 We have 73 jurors reporting on Tuesday. I am suggesting  
18 that, because this is a long trial, we go with 16 jurors. We  
19 may not be able to get that many into the box. We use podiums  
20 on either side, but that's about the maximum we can accomplish.

21 So any thoughts about numbers of jurors? Obviously we  
22 want a jury of 12 at the end of the day. We should be talking  
23 about whether we retain alternates and what the plan is, and we  
24 shouldn't wait till the last minute to do it.

25 So let's start with you, Mr. Jackson, first. How many

1 jurors do you think we should have through the trial in terms  
2 of -- we'll have 12, but we need alternates as well.

3 MR. JACKSON: Whatever the Court thinks I think would  
4 be sufficient.

5 THE COURT: Okay.

6 MR. JACKSON: Your Honor, you said 74 jurors? I only  
7 had 64 questionnaires that were given to me.

8 THE COURT: Seventy-three are reporting. So you  
9 should be getting additional questionnaires.

10 MR. JACKSON: Okay.

11 THE COURT: I'll put a note on that.

12 MR. JACKSON: Okay.

13 THE COURT: Mr. Ophardt?

14 MR. OPHARDT: I think four alternates makes sense,  
15 Judge.

16 THE COURT: Okay. So the next thing I want to tell  
17 you is we're going to do the following to make sure that the  
18 jury is not alerted to the fact that Mr. Jackson is  
19 incarcerated. My practice is to come into the courtroom before  
20 the jury does, so that makes it easy. They will be out of the  
21 room when you come in, when incarcerated witnesses come in.  
22 You will do -- both sides will do their questioning from behind  
23 the tables unless you're using the podium and the ELMO. And  
24 when you do your questioning from the podium, you are behind  
25 the podium. Nobody is roaming around the podium or -- you are

1 behind that. And that goes for both sides.

2 Mr. Behrens and whoever is not questioning on behalf of  
3 the Government will be providing exhibits to Ms. Ruddy. So we  
4 aren't going to have people roaming around the courtroom,  
5 because we don't want the marshals to have to get involved with  
6 that.

7 We're going to have a court security officer and a marshal  
8 sitting by the door there. When somebody who is incarcerated  
9 is testifying, they're going to do an individual assessment  
10 about the security risk of taking off any form of restraints.  
11 The Court's goal is to not have witnesses significantly  
12 restrained, but, frankly, their preference is shackles,  
13 handcuffs, belly chain, and that's their typical practice when  
14 somebody is there because there's insufficient people to deal  
15 with that witness.

16 Any thoughts about movement in the courtroom?

17 This time I'm going to start with the Government.

18 MR. OPHARDT: I think your Honor said this, but just  
19 to confirm my understanding, we're going to pre-position  
20 custodial witnesses prior to the jury coming in?

21 THE COURT: Yes.

22 MR. OPHARDT: Okay. One thing we had, I think, raised  
23 informally that I think would be helpful to know: Is the  
24 Court -- can we put an exhibit binder with the witness? Is  
25 that acceptable with the Court?

1 THE COURT: It's acceptable with me, and that's why I  
2 think for some people the handcuffs are going to be a problem.

3 MR. OPHARDT: Yes.

4 THE COURT: Because if you're asking somebody to --  
5 "Could you turn to page 22 in the binder," it's pretty  
6 difficult to do it with handcuffs. So that's -- that's my  
7 concern. And I can talk to the marshals about that, but you're  
8 going to be asking them to do that, correct?

9 MR. OPHARDT: With some of them, yes, your Honor.

10 THE COURT: Okay.

11 MR. OPHARDT: Not with all.

12 THE COURT: All right. I will talk to them about  
13 making that assessment. Our point person is Drew Rice on this  
14 trial, and he will know who we can have latitude with and who  
15 we cannot. And I don't know of anybody who's going to be a  
16 problem, so --

17 MR. OPHARDT: Thank you, your Honor. We can talk  
18 directly with Deputy Rice as well. I think we -- we can look  
19 at our witness order and ascertain too whether or not we think  
20 exhibits will be in evidence, because if we have them in  
21 evidence, then we don't need the binder because we can use the  
22 monitor, so that also might alleviate some of the need for  
23 freedom of movement with hands.

24 THE COURT: Okay. Mr. Jackson, any thoughts on this  
25 particular issue?

1 MR. JACKSON: No, your Honor.

2 THE COURT: All right. I know that in advising  
3 Mr. Jackson of the Court's concerns about self-representation,  
4 we've had that conversation several times. I had the  
5 Government recite the applicable penalties and had Mr. Jackson  
6 confirm that he had received that information. I don't know if  
7 I did it when we had the third superseding indictment. I can't  
8 remember when that occurred in the process, so I would like  
9 that information repeated unless Mr. -- I want it repeated even  
10 if Mr. Jackson is confident that he knows what the applicable  
11 penalty is. So I think the biggest change is brandishing is  
12 out, and that has a seven-year mandatory minimum.

13 MR. OPHARDT: That's correct, your Honor. Your Honor,  
14 are you looking for count by count or --

15 THE COURT: You can do it count by count, but it's  
16 important in evaluating the right to represent yourself, which  
17 is a constitutional right, that you know the penalties, and I  
18 know we had that conversation, but I can't remember the timing  
19 of it.

20 MR. OPHARDT: Yes, your Honor. So your Honor's  
21 correct that the third superseding indictment did reduce the  
22 mandatory minimum, and it therefore also reduced the total  
23 potential mandatory minimum. I'll just proceed count by count.

24 Count 1 charges a drug conspiracy. It includes an  
25 allegation of 500 grams or more of a mixture or substance

1 containing a detectable amount of cocaine. The statutory  
2 penalties pursuant to 841(b)(1)(B) are five to 40 years.

3 Count 2, 3, and 4 all relate to -- well, Count 4 has been  
4 dismissed. Counts 2 and 3 relate to distribution of cocaine or  
5 cocaine base. The statutory penalties are zero to 20 years.

6 Count 5 relates to possession with intent to distribute  
7 cocaine and cocaine base. Those statutory penalties are zero  
8 to 20 years.

9 Count 6 is the 924(o) charge. That, I believe, is zero to  
10 20, is my recollection. Ms. Cate's going to double-check me.

11 924(c) charge in Count 7 is a mandatory minimum of five  
12 years consecutive to any other term and punishable by up to  
13 life in prison.

14 Count 8, the felon in possession count, is punishable by  
15 zero to ten because at the time of the allegation, the  
16 penalties in effect at the time, November 23rd, 2021, were zero  
17 to ten.

18 THE COURT: And we'll wait for Ms. Cate's  
19 confirmation.

20 MR. OPHARDT: And 20 years is correct as the maximum  
21 for 924(o), your Honor.

22 THE COURT: Mr. Jackson, were you aware of those  
23 penalties?

24 MR. JACKSON: Yes, your Honor.

25 THE COURT: All right. And do you need any more

1 information about that subject?

2 MR. JACKSON: No, your Honor.

3 THE COURT: So then I'm glad we've had this, because I  
4 hadn't thought about it. What do we do with regard to Count 4  
5 in terms of describing to the jury what happened with regard to  
6 Count 4?

7 MR. OPHARDT: Your Honor, I know there's an  
8 instruction in Sand's about kind of missing counts when we have  
9 defendants who were charged together, so there may be some  
10 inspiration there for an instruction to the jury if the Court  
11 desires. It hadn't struck me because I'm not particularly  
12 concerned about it.

13 THE COURT: I'm not either, but I did notice that if I  
14 was a nosy juror, I would assume something got dismissed, which  
15 is an assumption that's correct.

16 MR. OPHARDT: That would be correct, Judge. So I'm  
17 not too concerned about prejudice, but if the Court would like  
18 an instruction, I think Sand's probably has something close.

19 THE COURT: Mr. Jackson, any thoughts about Count 4?

20 MR. JACKSON: No, your Honor.

21 THE COURT: All right. So I'm going to just let it be  
22 unless I find that there's a problem.

23 Okay. Speaking of jury instructions, I read the  
24 Government's support for vouching for the quantity of -- for  
25 the quality of controlled substances, negotiating for and



1 receiving the price, and that's in the definition of  
2 distribution. I also looked at the case. So the authority is  
3 pretty scant. It's old, it's a jury instruction, and it's  
4 about a case in which the person who was charged with  
5 distributing was riding in a car and actually at the sale. I  
6 didn't see anything in that case that would support vouching  
7 for the quality of controlled substances alone as sufficient.  
8 It was kind of a totality.

9       So I think that should be struck and it should include  
10 "negotiating for or receiving the price," which is part of  
11 distribution - that's the sale - "and supplying or delivering  
12 the controlled substances may constitute distribution. In  
13 short, distribution requires a concrete involvement in the  
14 transfer of the controlled substances."

15       And what I'm thinking about is, for example, suppose Jane  
16 Wilson says, "That cocaine is the greatest I've ever had," and  
17 she's, you know, not part of the transfer; she's not going to  
18 get any proceeds; she's talking about her personal experience  
19 with it. I don't think anybody would say that's distribution.  
20 It has to be somebody involved in the transfer.

21       So I'm not inclined to include "vouching for the quality  
22 of controlled substances." I know we've given that instruction  
23 in the District of Vermont probably many times based on Sand's,  
24 but it really gives me pause because I can think of many  
25 circumstances where it wouldn't involve a concrete involvement

1 in the transfer of the controlled substances.

2 So any thoughts about that, first from the Government?

3 MR. OPHARDT: Your Honor, we do not object to that  
4 being struck in relation to the distribution charges. I don't  
5 recall if it's in the "possession with intent to distribute"  
6 language. I do view that as being a slightly different  
7 circumstance.

8 THE COURT: I think that they may have a different  
9 definition. So let me turn to it. Remind me which count we're  
10 talking about.

11 MR. OPHARDT: Count 5, your Honor. But I'm not seeing  
12 it in the instruction.

13 THE COURT: Yeah. Intent to Distribute is on page 22,  
14 and it does not include the language that is concerning from  
15 the Court's perspective.

16 MR. OPHARDT: Okay. Thank you, your Honor.

17 THE COURT: Mr. Jackson, anything that you want to say  
18 about that?

19 MR. JACKSON: No. I have no objections, your Honor.

20 THE COURT: Okay. Now let's talk about the voir dire,  
21 and we talked earlier about the Court giving general  
22 instructions about bias, and now the Government has supplied  
23 the transcript in the Dennis Martin case which the Court asked  
24 some questions about bias and racism. I frankly did it in that  
25 case because both parties asked me to do it. I thought there

1 could be an argument that it draws attention to something that  
2 maybe people weren't thinking about, but both parties wanted  
3 it, so I did it.

4 Now that you've seen the language that the Court used in  
5 Dennis Martin, I'm going to turn to you, Mr. Jackson. Do you  
6 want the Court to engage in that voir dire? Do you not want  
7 the Court to engage in that voir dire? What's your preference?

8 MR. JACKSON: I have an objection to that, your Honor.  
9 I don't think it's necessary. Throughout the course of this  
10 process, there's never been a race issue to me, so I don't  
11 think that should be brought up. I think, you know, we should  
12 just proceed right down the middle with the case and argue the  
13 case as it is. I mean, I've been in Vermont 15 years, so I  
14 know what I'm facing, so I don't think -- you know, I don't  
15 have any objections with an all-white jury or all-Black jury.  
16 I mean, if it's a bias that come up, I think we'll figure it  
17 out then, but for now I don't think it's necessary.

18 THE COURT: All right.

19 MR. OPHARDT: Your Honor, we're fine with the Court  
20 not addressing it. We just thought it would be a helpful  
21 suggestion. We may still address some of those issues on our  
22 own, in our own voir dire.

23 THE COURT: You can. But coming from me and me asking  
24 people, you know, how much racism have you heard, really I  
25 don't know that it does anything other than have people talking

1 about other examples of racism that have nothing to do with  
2 this case.

3 MR. OPHARDT: I understand your Honor's concerns. We  
4 weren't trying to force the Court to do anything. We just  
5 thought it would be a helpful suggestion. We don't have a  
6 fluid way to communicate directly with Mr. Jackson, so we made  
7 the suggestion, and we'll handle it during our own voir dire.

8 THE COURT: Okay. So then I'm going to take the  
9 motions *in limine* in the order in which they're filed. I will  
10 circle back around and make sure that I have covered  
11 everything.

12 I have read everything that you've filed.

13 So the first one was filed by Mr. Jackson, I believe in  
14 the order of which it was filed, and that's Document No. 211,  
15 and that is the motion *in limine* seeking the Court's dismissal  
16 of Counts 1, 5, 6, 7, and 8 of the third superseding  
17 indictment.

18 You're not seeing that as --

19 COURTROOM DEPUTY: Are you going in order of --

20 THE COURT: Yes.

21 COURTROOM DEPUTY: 203 is the first.

22 THE COURT: 203. Sorry. I have 203, but this is  
23 dated 3/25. I'll do it in the order. I'll put that aside.

24 The first one is 203, motion *in limine* to allow admission  
25 of evidence regarding uncharged drug transactions.

1           Let's start with the moving party, which is the  
2 Government, and then I will hear from the defendant.

3           MS. CATE: Thank you, your Honor.

4           I'll start by stating I think that this motion was rather  
5 inaccurately or at least inartfully titled. As set forth in  
6 the motion, our position is that evidence about Mr. Jackson  
7 distributing controlled substances, and specifically cocaine  
8 and cocaine base as alleged in Count 1, is actually fair game  
9 for evidence in front of the jury because Count 1 charges on or  
10 about beginning in January of 2021. And the case law is clear  
11 that the time frame that the evidence comes in at needs to be  
12 reasonably near the charged time frame, but where, as here, the  
13 exact date is not an element of the offense, the evidence can  
14 be presented a bit outside of that time frame, and I think  
15 we're squarely there here. So that's sort of our primary  
16 argument.

17           In addition, as stated, the sum of the evidence that we  
18 anticipate coming in will help just lay the groundwork for how  
19 the various witnesses came to know Mr. Jackson or the  
20 interactions they had with him.

21           And finally, Mr. Jackson is also charged with two  
22 distributions that are in 2020, in August and September of  
23 2020, so his interactions either purchasing -- specifically  
24 maybe purchasing narcotics that he then redistributed is  
25 probative evidence of those charges also.

1 THE COURT: So sometimes when there is just a  
2 conspiracy charge, I have been asked to have a time frame that  
3 allows for the start-up of the conspiracy and then the  
4 unwinding, and the Court has gone as far as six months on  
5 either side of the "on or about" date, and the case law that  
6 you have suggested is that it should be a matter of months, not  
7 a matter of years, and I think the farthest the Second Circuit  
8 has gone is 16 months. But I do think you have shifted your  
9 theory, and it occurred to me that we were talking about 2020  
10 anyway. This isn't really going beyond the conspiracy because  
11 there are charges in that September 2020 time frame. The  
12 earliest would be September 2020, correct?

13 MS. CATE: I believe Count 2 is actually August of  
14 2020.

15 THE COURT: August of 2020? Okay. And then you are  
16 not asking for any tail to come out. So when -- on the other  
17 side of it.

18 MS. CATE: Mr. Jackson was arrested on November 23rd  
19 of 2021, so that is the conclusion --

20 (Interruption by the reporter.)

21 MS. CATE: We are not seeking to introduce drug  
22 distribution after November 23rd of 2021.

23 THE COURT: All right. So the time period will be  
24 August 2020 to November -- the date of the arrest in 2023.

25 Mr. Jackson, this motion at this point is unopposed, but

1 let's hear any verbal opposition you have to it.

2 MR. JACKSON: Well, just to Count 1, your Honor, about  
3 the conspiracy charge in general, this investigation took place  
4 after my arrest, not before an arrest. I was charged with  
5 three sales on November 23rd, the day I got arrested, so there  
6 was nothing mentioned as a conspiracy before that until after  
7 November 23rd.

8 Now, from what I understand about conspiracy and reading  
9 the statute and reading other cases about it, that a conspiracy  
10 has to be before the fact unless there's something continuing.  
11 There was nothing continuing after November 23rd, so the  
12 investigation from, you know -- the way I'm looking at it is it  
13 happened after -- the investigation happened after November  
14 23rd. Witnesses in between November 23rd came maybe six to  
15 eight months later. I believe there's one co-conspirator that  
16 they have that's going to testify in court. He came forward  
17 with information eight months later, you know, alleged  
18 information about a conspiracy, but I just don't see, you know,  
19 conspiracy there. I just don't see it.

20 THE COURT: All right. So we're talking about the  
21 time frame of the behavior, not when people reported it, not  
22 when it was investigated, not when it was discovered. We're  
23 talking about the behavior or the acts that the jury's going to  
24 hear about, and originally the Government was asking the Court  
25 to look at the conspiracy charge and do what many courts have

1 done, which is what I just said: Okay. There's a little bit  
2 of period of winding up, like the first day of the conspiracy  
3 is generally not when a sale occurs, because you have to have  
4 people who know each other and have decided to do something  
5 unlawfully, and so the courts usually allow activity both  
6 before and after the "on or about." We don't have to worry  
7 about after because you were arrested, so you weren't doing  
8 anything, although part of a conspiracy can be what happened  
9 even after you were arrested, but they're not asking for that.

10 So this is what happened from August 2020 to the date of  
11 your arrest, and it doesn't matter when somebody reported it.  
12 That's what they're claiming is the activity that they want to  
13 present to the jury.

14 So your response, if any, to that?

15 MR. JACKSON: Well, Count 4 is dismissed, and that  
16 would be the last date of any -- after September -- August,  
17 September, so -- well, your Honor, I just don't see a  
18 conspiracy in August. Count -- and Count 4 was dismissed.  
19 That would have happened in September. So I don't know where  
20 the Government is trying to figure out a conspiracy from that  
21 point and who they're trying to figure out who I conspired  
22 with.

23 THE COURT: Any response?

24 MS. CATE: It sounds as though Mr. Jackson is  
25 challenging the sort of -- whether the Government can prove the



1 conspiracy, which is a different question than what evidence  
2 can come in in an attempt to prove the conspiracy. Beyond  
3 that, I have no other response.

4 THE COURT: All right. The Court is going to allow  
5 evidence of acts from August 2020 to the date of Mr. Jackson's  
6 arrest subject to establishing that they are relevant. This is  
7 the time period in the third superseding indictment. It is not  
8 far apposed from the "on or abouts" in those counts.

9 In addition, this is not separate behavior. This is  
10 behavior that's inextricably intertwined with the charged  
11 crimes, and therefore it is not something that the Government  
12 is asking to go outside the normal period that would be  
13 admissible evidence.

14 In addition, any prejudice is minor. It's not  
15 different-in-kind conduct from the conduct at issue. It  
16 doesn't involve a wholly different group of participants, and  
17 so the Court's going to allow it.

18 But before this evidence comes in that is outside of a  
19 charged event, and I don't think we're going to be hearing  
20 that, I want you to make a proffer in terms of this, because  
21 one of the things in this case is that there's an allegation  
22 that the nature of the drug trafficking, the alleged drug  
23 trafficking, changed when Mr. Jackson got new suppliers, and  
24 that is the conspiracy that is charged in Count 1, correct? So  
25 the -- Mr. Jordan --

1 MS. CATE: Your Honor, in part, certainly we are  
2 alleging that Mr. Jackson's interactions with his suppliers is  
3 one part of the conspiracy. We believe there will also be  
4 evidence about his interactions with folks in Rutland who were  
5 assisting him with drug transactions or enforcement that also  
6 is part of the conspiracy.

7 THE COURT: All right. The Court's going to grant the  
8 Government's motion *in limine*, Document No. 203, and I will be  
9 asking for proffers as we proceed when the Court finds it's  
10 necessary.

11 And, Mr. Jackson, you can also ask for proffers, and the  
12 Court will decide whether or not that has to happen.

13 The next one is Document No. 204, motion *in limine* to  
14 allow admission of evidence of defendant's actions with a  
15 firearm. This is the pistol-whipping of a person who has his  
16 initials provided.

17 I've been told by the Government in their motion that  
18 Mr. Jackson knows who this person is and that there are several  
19 witnesses who watched that and that the purpose of the  
20 pistol-whipping was twofold: to collect a debt and also  
21 because of this person's involvement with somebody who was  
22 close to Mr. Jackson.

23 So I'm going to let the Government argue that motion  
24 further now that I've identified which it was, and then we're  
25 going to hear from Mr. Jackson.

1 MS. CATE: Your Honor, one of the charges in the  
2 indictment is a 924(c). There are several prongs of that,  
3 including that Mr. Jackson used a firearm during and in  
4 relation to his drug trafficking activity. Pistol-whipping a  
5 customer or somebody who owes him a debt because of drug  
6 trafficking is squarely in the heartland of evidence to prove  
7 that he used that firearm in furtherance -- or during and in  
8 relation to his drug trafficking. The case law says that to  
9 "use" a firearm, you need to "actively employ" it, and  
10 certainly pistol-whipping would be an example of active  
11 employment. The anticipated evidence will put that event  
12 squarely within the time frame that the 924(c) charge is, and  
13 we just think that it's squarely probative, extremely  
14 probative, and any perceived unfair prejudice is outweighed by  
15 the probativeness for the 924(c) count. We've made other  
16 arguments, but that is the gist of it.

17 THE COURT: Should the Court be giving a curative  
18 instruction that although the jury can consider the  
19 pistol-whipping in determining whether or not Mr. Jackson used  
20 and possessed a firearm, it should not -- it need not find --  
21 this isn't a case in which a pistol-whipping has been charged?  
22 I'm just thinking about the differences between brandishing and  
23 whether or not there should be any kind of curative  
24 instruction. Any thoughts about that?

25 MS. CATE: I don't think there's an opposition to a

1 curative instruction necessarily. I mean, the ask would be for  
2 the jury to consider that evidence when considering the  
3 elements of the charges that are -- that have been charged, not  
4 to consider it for some other reason.

5 THE COURT: There will be that instruction.

6 MS. CATE: Right. I'm not sure actually how else to  
7 cure it. One moment, your Honor.

8 Thank you, your Honor. I think the Government's  
9 perception is that the use is sort of -- it's like a bit of a  
10 pyramid or a narrowing. So there could be use or there could  
11 be brandishing or there could be discharge, so charging the use  
12 and putting in evidence of the use isn't problematic in any  
13 way. It's not like a separate charge than brandishing.

14 THE COURT: It couldn't possibly from your perspective  
15 trigger brandishing?

16 MS. CATE: Whether it could or not, that hasn't been  
17 charged, and we're certainly not seeking to have the jury find  
18 brandishing.

19 THE COURT: Okay. And then we have an incident in  
20 which Mr. Jackson allegedly pointed a firearm at a  
21 co-conspirator, and that was The Judge firearm which you are  
22 claiming is relevant to multiple counts, and let's hear from  
23 you on that one.

24 MS. CATE: Yes. The Judge firearm is one of the  
25 firearms envisioned for the 924(o) and the 924(c). It is also

1 the firearm alleged in the felon in possession count, so the  
2 Government needs to prove that Mr. Jackson possessed that  
3 firearm. It is a distinctive firearm, and it has words on it  
4 that say "The Judge," so having a witness testify "I saw him  
5 with that. I know that because it was close to me; it was in  
6 my face" is extremely probative of his possession.

7 THE COURT: All right. Mr. Jackson, any response?

8 MR. JACKSON: Yes, your Honor. From my understanding  
9 of a 924(c) charge, in order for me to pistol-whip somebody, I  
10 have to brandish the weapon. You have to take the weapon out  
11 to hit somebody with it. The Government took brandishing out  
12 of the second superseding indictment when they charged me in  
13 the third superseding indictment.

14 And, you know, to clarify that, to sum all that up, they  
15 know who Michael Washburn is. The United States Government  
16 know who this man is. I know who he is. There's no testimony,  
17 no nothing from Michael Washburn that I ever touched him,  
18 because it's not true. You know what I mean? This was a big  
19 advertisement, a big rumor running around Rutland, Vermont,  
20 that I pistol-whip people. They know who this man is. Bring  
21 him to court. Why do you need somebody to testify that they  
22 seen me pistol-whip somebody and they know who this guy is?  
23 They gave me a picture of the man, of who Michael Washburn is,  
24 you know? So bring Michael Washburn to court. There's no way  
25 you can say that I pistol-whipped somebody and I didn't

1 brandish the weapon. You have to brandish a weapon in order to  
2 hit somebody with it.

3 So I will leave it like that and let your Honor make her  
4 decision.

5 THE COURT: Well, you can certainly argue to the jury  
6 in closing that "Where is Michael Washburn?"

7 MR. JACKSON: Um-hum.

8 THE COURT: That's fair game. "We heard from people  
9 who saw it, but, you know, where's the person who allegedly was  
10 pistol-whipped?" We're on a different part of the case right  
11 now, and you are right, I think pistol-whipping probably is the  
12 same as brandishing, but you are not being charged with  
13 brandishing, nor would you want to, because that ups the  
14 mandatory minimum penalty.

15 And I would compare it to this situation: In a case, the  
16 Court may charge -- or the Government may charge a defendant  
17 with attempted murder. When they get to trial, they say, "You  
18 know what? That -- I don't know. That has a lot of intent  
19 involved. We're going to reduce it to attempted aggravated  
20 assault, serious bodily injury." That's all good for the  
21 defendant, but then they don't have to prove attempted murder.

22 So they have taken away brandishing. We're still at use.  
23 And the Court has to find whether or not the pistol-whipping is  
24 so prejudicial in describing the use and the pointing the  
25 firearm is so prejudicial that its probative value is

1 substantially outweighed. So that's what we're getting at  
2 right now.

3       There is always going to be prejudicial -- prejudice from  
4 negative facts. I mean, the courts accept that. But it has to  
5 be under Rule 403 for the Court to exclude it if its probative  
6 value is substantially outweighed by a danger of one or more of  
7 the following: unfair prejudice, confusing the issues,  
8 misleading the jury, undue delay, wasting time, or needlessly  
9 presenting cumulative evidence. And I hear your argument is  
10 bring in the person who was pistol-whipped. They don't have to  
11 do that. They can prove it by an eyewitness, and it's fair  
12 game for you to argue to the jury that "If this happened, why  
13 isn't the person who was pistol-whipped, why wasn't he called  
14 as a witness?"

15       Go ahead.

16       MR. JACKSON: Yes. Thank you, your Honor. I'm going  
17 to go with your attempted murder and assault, and that's a good  
18 example, because regardless if they drop a charge like that  
19 toward assault, both them elements require physical injury to  
20 be proven; you understand? If it's an attempted murder, it  
21 requires physical injury, and if it's assault, it requires  
22 physical injury to be proven, either which way that go.

23       THE COURT: Not if it's attempt.

24       MR. JACKSON: Well, if it's attempt, I mean, you know,  
25 physical injury still has to happen. I mean, you know, unless

1 there's something else -- another element with it, another  
2 charge with it. If it's -- somebody was acting in commission  
3 of a felony or whatever the situation might be. But my main  
4 thing is this: When you look at both these incidents with  
5 Michael Washburn and Orlando Cruz, even though the Government  
6 didn't bring a brandishing charge, they took it out, Orlando  
7 Cruz stated in his statements that I pointed a gun at his face.  
8 If I pointed a gun at his face, your Honor, that means I  
9 brandished a weapon. I think that would be unfair prejudice to  
10 the jury for them to hear that when it's never been charged.  
11 There's never been an incident like that. He didn't say he  
12 sustained any injuries.

13       These people are saying that Michael Washburn suffered a  
14 broken nose, he was bleeding all over the place. None of these  
15 people throughout any one of their statements rendered aid,  
16 called 911, did anything, so from that point on, it's like me  
17 fighting a ghost. It's like me, you know, arguing to the jury  
18 that this never happened, even though these witnesses are  
19 claiming this, but it never happened, because there's no proof  
20 there that it did happen. There's not a witness. There's just  
21 two people making allegations.

22       And there's no element to it. You have to -- if I put a  
23 gun in somebody's face, you have to brandish the weapon. The  
24 Government had that on the second superseding indictment. They  
25 took it out, because obviously somewhere at some point in some



1 proffer statement or discussion with one of the witnesses,  
2 Mr. Ophardt probably didn't believe it to a certain point, you  
3 know, so maybe it's a theory he can prove in another way, but  
4 whichever way you look at it, your Honor, it's prejudice. It's  
5 unfair prejudice for a jury to hear that I put a gun in  
6 people's face and I pistol-whipped somebody and I'm not charged  
7 with it. That's a heinous crime.

8 THE COURT: All right. Any response?

9 MS. CATE: Your Honor, the case law is about unfair  
10 prejudice as opposed to prejudice. As the Court has pointed  
11 out, the evidence of folks committing crimes is going to be  
12 prejudicial. This does not fall into the category of unfairly  
13 prejudicial. It would be perverse if the Government had to  
14 charge the higher mandatory minimum in order to be able to  
15 present evidence that would prove the straight 924(c). That  
16 would be a bit of a strange situation.

17 Maybe another analogy in addition to the one the Court  
18 provided would be regarding quantities in a distribution -- in  
19 a drug distribution conspiracy. Even if the Government here  
20 had not charged the 500-gram mandatory minimum, we would still  
21 be putting in evidence of a lot of drug distribution, and it  
22 wouldn't be right to not let that evidence in unless we charged  
23 it.

24 THE COURT: All right. Here's how the Court's going  
25 to rule: There isn't any unfair prejudice with the

1 pistol-whipping and the pointing of the gun because there is no  
2 way this jury is going to find brandishing because it's not  
3 going to be asked to find brandishing.

4       A couple things that need to happen, however, is it's one  
5 thing to say that the purpose of the pistol-whipping and the  
6 pointing of the gun was related to drug debts. I don't want  
7 any mention of sex trafficking of a woman, and that's --  
8 there's an allegation that Mr. Jackson pointed a firearm at a  
9 co-conspirator because he allegedly attempted to sex traffic a  
10 woman. When he's not charged with sex trafficking, it's way  
11 outside. So I'm not going to allow a witness to say that.

12       In terms of whether or not this is something that a  
13 curative instruction can address, I am going to provide at the  
14 end of the trial a jury instruction that says that Mr. Jackson  
15 is only charged with the crimes alleged in the third  
16 superseding indictment; he's not charged with any other crimes;  
17 he can't be punished for them.

18       I am thinking that a similar instruction at this --  
19 whenever this evidence is introduced that "You're going to be  
20 asked to find whether or not he used a firearm. You are not  
21 going to be asked if he pistol-whipped somebody with that  
22 firearm, and you're not going to be asked if he pointed it at  
23 somebody. It is not offered for that. You won't be asked to  
24 make those determinations in this case." I'm thinking  
25 something of that sort may be appropriate so that the jury

1 understands why the evidence is introduced.

2 Any thoughts about that?

3 And I'll start with the Government this time.

4 MS. CATE: Thank you, your Honor.

5 With regard to the sex trafficking allegation, the  
6 Government does not intend to elicit testimony about that.  
7 That was provided so the Court had the context about the  
8 circumstances of that time the gun was pointed in Mr. Cruz's  
9 face, but we are not seeking to have that testimony be elicited  
10 during our direct examination.

11 With respect to the curative instruction, if the Court  
12 wishes to do that, the Government has no objection.

13 THE COURT: Mr. Jackson, any thoughts on this issue?

14 MR. JACKSON: Well, yes, your Honor. And that was a  
15 good point you brought up too. What if a juror do come back  
16 with a question after that and they want to ask your Honor to  
17 ask the Government did this happen? What kind of response is  
18 that going to be? How is the Government going to answer that  
19 when I've never been charged with that?

20 THE COURT: Well, first, it's the jury's job. So  
21 they're going to decide what happened or not happened, and if  
22 they decide it didn't happen, it may be harder for the  
23 Government to prove that you used a firearm. But they will --  
24 I will not be making any factual findings when we get into the  
25 trial unless they're related to evidence, which we're going to

1 talk about, like co-conspirators' statements. The jury's going  
2 to decide whether this happened. But I'm saying at the end of  
3 the day, they will not be allowed to find brandishing because  
4 that's not been charged. So the verdict form will never come  
5 back with "brandishing" checked.

6 My question is whether or not we should have an  
7 instruction at the time the evidence comes out that says "In  
8 this case the Government must prove beyond a reasonable doubt  
9 that Mr. Jackson used the firearm." They don't need to prove  
10 beyond a reasonable doubt that it was used for pistol-whipping  
11 or pointing at somebody, but you may not want that kind of  
12 curative instruction because you may want the jury to know that  
13 "If you're going to say I did this to Mr. Washburn, where's  
14 Mr. Washburn?" So that's what we're talking about the curative  
15 instruction.

16 Any thought about that?

17 MR. JACKSON: I mean, just listening to your Honor, it  
18 sounds like -- to me like it's coming both ways, so it's more  
19 like a Catch-22 with a jury instruction for that. It's like,  
20 you know -- it's up in the air, did he have a -- did he use a  
21 gun against somebody or didn't he? So I would have to leave  
22 that up to the Court.

23 THE COURT: All right. In a trial, there's a lot of  
24 things like that. So you may have a witness who is great for  
25 you on subjects one, two, and three and terrible for you on

1 subject number four. I mean, that's just life.

2       So in this particular case, under 403, the Court finds  
3 that the evidence is probative. We are not going to have any  
4 mention of sex trafficking. I will leave the issue of a  
5 curative instruction undecided. I will know at the time when I  
6 hear the testimony if I think that it has the potential to  
7 confuse the jurors or mislead them as to what's been charged.

8       So the Court conditionally grants the Government's motion  
9 *in limine* with regard to defendant's actions with a firearm,  
10 which is Document No. 204.

11       The next one is a motion *in limine* to allow admission of  
12 evidence of occupancy. This is Document No. 207. The  
13 Government wants to admit evidence of photographs and documents  
14 bearing the name Lawrence Jackson found in a bedroom at 55  
15 Killington Avenue, Apartment 2, in Rutland and testimony that a  
16 man knocked on the door of 55 Killington Avenue, Apartment 2,  
17 during the execution of a search warrant and said, "I'm looking  
18 for Mr. Lawrence."

19       So these are materials -- the paper and the photographs  
20 were obtained in the course of the search. A person came  
21 during the search. The courts have held that questions are not  
22 hearsay because they're not offered for the truth. This seems  
23 to be squarely within the evidence before the Court.

24       I understand that Mr. Jackson may introduce testimony that  
25 the reason his paperwork was at the place was because his

1 girlfriend was helping him obtain some official documents, and  
2 that's fair game for cross-examination and that's fair game if  
3 there's evidence to support it in closing arguments, opening  
4 arguments, but the issue is whether or not that information  
5 should come in.

6 And let's hear from you, Mr. Jackson, about that.

7 MR. JACKSON: Yes, your Honor. I don't have any  
8 problem with the mail or anything with my name on it, such as a  
9 Social Security card or traffic, because it has my true  
10 address, so if the Government want to introduce that, I plan to  
11 use that anyway, so I'm good with that.

12 THE COURT: All right.

13 MR. JACKSON: With the man knocking on the door, I  
14 don't know who would walk up on a raid with a hundred cops  
15 outside and ask for a person. I would think, you know, the way  
16 I'm looking at it, if he made a statement or asked a  
17 question -- I don't think that's more of a question. I mean,  
18 that's more of a statement the way the Government put it,  
19 because they want to use -- use that to prove occupancy, and  
20 nobody don't know who this mystery man is, so I think it's a  
21 threshold for a confrontation clause right there.

22 If the Government plans to introduce that, I think they  
23 should have to introduce that man for confrontation, because I  
24 don't know who it is, and this is the first time I heard about  
25 it, so -- just Wednesday, when I got this. So this is the

1 first time I've heard about it, so, again, I leave that up to  
2 the Court, but I have no problem --

3 THE COURT: There's no mention in any of the police  
4 reports that somebody showed up during the search warrant  
5 and --

6 MR. JACKSON: No.

7 THE COURT: -- asked this question?

8 MR. JACKSON: Not that I have.

9 THE COURT: All right.

10 MR. JACKSON: And I have over 3,000 pages, and I read  
11 everything frequently, over and over and over again, and this  
12 is the first time I ever seen that.

13 THE COURT: All right. And there is a -- from my  
14 understanding, a lengthy video of the execution of the search  
15 warrant; do I have that right? Because we have a debate about  
16 whether that whole video should be shown.

17 So let's hear the Government's response.

18 MR. OPHARDT: Your Honor's correct. There's a body  
19 camera video. Detective Jesse Dambrackas from the Vermont  
20 State Police was wearing it. It's a three-and-a-half-hour-long  
21 video. That is where -- I can't remember the last name he  
22 gave. I think the first name he gave was Rupert -- is depicted  
23 knocking on the door. The door -- well, the door's knocked  
24 upon. Sergeant Dambrackas opens the door, and a person is  
25 there and engages in a conversation with law enforcement.

1           So there is no mention of it in a written report. The  
2 Government learned about it through viewing the body cam  
3 footage itself. We do not intend to show that clip itself  
4 because there is additional information that the individual  
5 provides about being owed money for a gold chain and those  
6 sorts of things, which I think are unnecessary. The  
7 Government's intent is to have Detective Dambrackas testify  
8 that this event occurred, that the individual was inquiring  
9 about whether Lawrence was at the apartment, and then leave it  
10 at that.

11           Mr. Jackson raised the confrontation clause. Case law is  
12 clear the confrontation clause requires it to be testimonial  
13 hearsay in nature. This was not testimonial hearsay in the  
14 sense that it was not provided to law enforcement with the  
15 intent of having it used in court at a later date. It appears  
16 that the individual who knocked on the door was unaware of law  
17 enforcement's presence inside. Certainly --

18           THE COURT: So this is not my credibility  
19 determination, and if there's a video, there's a video.  
20 Mr. Jackson has a point. I would assume there's cruisers out  
21 front, and people do stupid things and come up in the middle of  
22 something like that, but it is kind of unusual.

23           MR. OPHARDT: It is unusual, your Honor. My  
24 understanding is scene security was not optimal during the  
25 search because folks were out looking for Mr. Jackson and they



1 found Mr. Jackson very close nearby, so a lot of law  
2 enforcement pivoted from security around 55 Killington to the  
3 scene of the traffic stop to assist with his apprehension. So  
4 I think that explained why they were a little -- minimum  
5 manning at the time. The Government's not conceding there was  
6 a lack of scene security. That's why Detective Dambrackas was  
7 there with the search team.

8 But when the Court hears the officers' testimony about  
9 where this residence was located on the second floor with a  
10 very covered stairwell from the back of the building, it's dark  
11 out at the time, late November, during the execution of a  
12 warrant, after 6:00 PM, it's not -- unsurprising that somebody  
13 was able to walk up to the door.

14 But the Government does not have a concern as to  
15 confrontation clause because this was not the type of statement  
16 that was being offered -- in addition to not being hearsay, it  
17 also was not the type of information being offered to law  
18 enforcement with the purpose of them doing something with it  
19 for charging purposes or other reasons that would fall within  
20 *Crawford's* ambit for confrontation clause analysis.

21 THE COURT: Mr. Jackson, you have this video because  
22 one of the things you're asking the Court is to play the whole  
23 video.

24 MR. JACKSON: I don't want to play the whole video,  
25 your Honor. There's going to be played snippets out of the

1 video. But I disagree with Mr. Ophardt about *Crawford v.*  
2 *Washington*. If you try to prove a certain fact and they want  
3 that fact to come into evidence, even if it's from an officer  
4 stating that, that is testimony. They claim that Rupert came  
5 to -- upstairs during the raid, knocked on the door during the  
6 raid, Officer -- State Trooper Jesse Dambrackas opened the  
7 door, and somebody asked for somebody during the raid, and they  
8 want to prove occupancy.

9 If they want to prove something, his tes- -- his asking  
10 for me, they want to use that as proof that I occupied that  
11 apartment, that I lived there, so to me that's testimonial, and  
12 I think that's right on the lines of Supreme Court Justice --  
13 I'm sorry I'm pronouncing his name wrong, Justice Scalia,  
14 however you pronounce it, I'm sorry, in *Crawford v. Washington*,  
15 any testimony of it bearing proof, place, or things is  
16 testimonial, so I don't -- I don't see how Mr. Ophardt look at  
17 that differently when he want another officer to confirm Rupert  
18 knocked on the door, asked for Jackson, and just by him asking  
19 for me proves that Jackson lives there. I think that's -- can  
20 be part of confrontation, your Honor.

21 THE COURT: The Sixth Amendment to the United States  
22 Constitution sets out the defendant's right to confront their  
23 accusers. The relevant text of the confrontation clause of the  
24 Sixth Amendment reads as follows: "In all criminal  
25 prosecutions, the accused shall enjoy the right . . . to be

1 confronted with the witnesses against him."

2 In *Crawford* the court changed the previous analysis as for  
3 when prosecutors can use out-of-court statements against a  
4 defendant. "Before *Crawford*, the Supreme Court had held that  
5 out-of-court statements did not violate the confrontation  
6 clause as long as they were adequately reliable. In *Crawford*,  
7 the Court changed course and determined that defendants had a  
8 right to cross-examine out-of-court statements, regardless of  
9 whether or not the statements were reliable.

10 "After *Crawford*, the government cannot use out-of-court  
11 statements that are offered as testimony against the defendant  
12 unless the witness is unavailable and the defendant has a  
13 previous opportunity to cross-examine the witness."

14 In this case, I'm not sure whether or not this is a  
15 testimonial statement. It's certainly offered against the  
16 defendant. It isn't hearsay because it's a question, and there  
17 is ample case law that says questions posed do not constitute  
18 hearsay. There was actually a fairly recent summary order from  
19 the Second Circuit in *United States v. Dominguez-Gabriel*, 511  
20 F.App'x. 17, (2d Cir. 2013), that says just that: "questions  
21 posed . . . do not constitute hearsay." This is based on prior  
22 Second Circuit precedence. Questions are ordinarily not  
23 hearsay because they are not offered for the truth of the  
24 matter.

25 Testimonial typically involves a statement at a police

1 station in which somebody is making an accusation. So in  
2 *Crawford*, if I'm remembering the facts correctly, it was a  
3 domestic violence statement that was made at the police  
4 station.

5 Let's talk -- let's focus on what are the requirements for  
6 testimonial statements in *Crawford*, and I'm going to start with  
7 the Government.

8 MR. OPHARDT: Your Honor, it's been a bit since I  
9 briefed the issue. My recollection is that it looks to the  
10 intent of the person providing the statement to whether or not  
11 they are hoping for law enforcement to take particular action.  
12 There's a lot of case law over 911 phone calls. 911 phone  
13 calls for requests for assistance during an emergency are  
14 deemed non-testimonial in nature, where those seeking to report  
15 wrongdoing after the emergency is concluded are considered to  
16 be testimonial.

17 I also know that the courts have -- I also submit to your  
18 Honor that the courts have pretty routinely found that first  
19 something has to actually be hearsay to be subject to the  
20 confrontation clause analysis. So if the Court is finding that  
21 the individual statement "Is Lawrence" -- the individual  
22 statement "I'm looking for Lawrence" to not be hearsay, then we  
23 don't have a confrontation clause issue because it's not being  
24 offered for the truth.

25 In order for something to be testimonial, it has to be

1 being offered by the Government for the truth of what's being  
2 asserted. It is unclear from the interactions whether or not  
3 the declarant knew law enforcement would be present, but he  
4 never asked law enforcement to take any action whatsoever in  
5 relation to his allegation of being deprived of a chain or  
6 money for the chain. He doesn't file a police report. He  
7 doesn't request law enforcement's assistance. He's simply  
8 inquiring as to whether or not Mr. Jackson, by using his first  
9 name Lawrence, was present at the apartment.

10 In addition, the Government is not intending to offer any  
11 information about the purpose of the inquiry other than simply  
12 that the inquiry was made as to whether or not "Lawrence" was  
13 present. That portion is, the Government submits,  
14 non-testimonial in nature. I think there could possibly be an  
15 argument as to whether or not the additional statements  
16 thereafter are testimonial in that the individual now  
17 recognizes this is law enforcement and he is making a statement  
18 about certain property that he believes he's been deprived of.

19 So I think the Court can safely bifurcate the two, and its  
20 ruling that it is not hearsay largely dictates the outcome of  
21 the confrontation clause analysis.

22 THE COURT: Mr. Jackson, anything you want to say  
23 about this further?

24 MR. JACKSON: Yes. Just one thing, your Honor. The  
25 Government is trying to offer proof of occupancy. Now, I read

1 some of the -- a lot of the case law they put in here, and a  
2 lot of case law that the Government used was the analysis of --  
3 let's say credit card fraud or bank robbery or something or a  
4 person signing bad checks and they got him going to the bank.  
5 In those particular cases, they can prove a person was at a  
6 particular place at a particular time for a particular reason.

7 In my case here, your Honor, with Mr. Rupert question,  
8 they made it testimonial when they want to use it to prove that  
9 I lived at 55 Killington Avenue because he came to 55  
10 Killington Avenue, allegedly, looking for me. So when you look  
11 at it from that aspect, it's past hearsay if they want to use  
12 it as testimonial, if they want an officer to testify to the  
13 fact that Mr. Jackson lived at 55 Killington Avenue. That  
14 was -- I mean, that's a major part of the case, a major part of  
15 the warrant where they say they have multiple witnesses say  
16 that I live at 55 Killington Avenue. But I think his statement  
17 alone, if they want to use it, I think that -- that's subject  
18 to cross-examination.

19 THE COURT: Well, certainly you want confrontation,  
20 though. You want the witness here who made the statement.

21 MR. JACKSON: Well, no, your Honor, it's not that I  
22 want the witness here. I don't want him here. I'm just, you  
23 know, arguing the fact that it shouldn't be used, you know.  
24 That's all.

25 THE COURT: So I have a good cheat sheet on *Crawford*,

1 but I just don't have it with me right now because I wasn't  
2 seeing this as a confrontation clause issue. It hadn't --  
3 there was no response filed to this motion.

4 The question -- questions are not hearsay because they are  
5 not offered for the truth. They're offered for the purpose of  
6 the person's state of mind. He's asking, "Is Lawrence here?"  
7 It doesn't establish that Lawrence is here. It establishes  
8 that the person was expecting to find Lawrence there, and that  
9 can be used as proof of occupancy.

10 The confrontation clause issue is a little bit more  
11 complicated, and it is being used against Mr. Jackson, so it is  
12 being used to establish that he was an occupant. I'm not sure  
13 about whether it was testimonial. I don't think the intent of  
14 Rupert, whoever this was, was to provide information to law  
15 enforcement that would result in it being used in a trial  
16 against Mr. Jackson. He was just looking for Mr. Jackson. And  
17 that's something that appears to distinguish it from somebody  
18 going to the police station and reporting a crime, and that  
19 seems to be the way the cases come out.

20 When you're calling 911, there's an emergency. "You need  
21 to come here. Somebody's bleeding all over the floor." You're  
22 not thinking, typically, "Well, that's going to be used in a  
23 prosecution." You want somebody to come and render aid. I'll  
24 take a harder look at it and have a better answer for you prior  
25 to our jury draw, but that's -- that's my concern is whether or

1 not it's testimonial or not.

2 Any further subjects? So I'm going to defer ruling on  
3 that part of it. The Court finds the question itself is  
4 non-hearsay.

5 There is no issue with regard to photographs, paperwork,  
6 anything with Mr. Jackson's name on it. Both parties intend to  
7 use it, and there's -- Mr. Jackson does not object to that, and  
8 that part of the motion *in limine* is granted.

9 Now let's go to the next one, which is admissibility of  
10 admissions of the defendant, Document No. 208, and this is  
11 about the messages that contained and whether the customer  
12 statements are also adopted admissions -- or adoptive  
13 admissions and whether or not the customer statements are  
14 necessary to show -- to make the messages intelligible.

15 I'm going to hear from the Government, and then we'll hear  
16 from Mr. Jackson.

17 MR. OPHARDT: Thank you, your Honor.

18 The Government has laid out a sampling of messaging  
19 between certain individuals who were seeking to obtain  
20 controlled substances and the user of the phone that we  
21 attribute to Mr. Jackson. Each of the examples the Government  
22 provides are examples of what we'd characterize as adopted  
23 admissions. These are not adoptions by silence, which there's  
24 a substantial amount of case law about that, and so I want to  
25 just distinguish the two. The Government's argument is that



1 Mr. Jackson responds in a relatively timely manner to these  
2 inbound messages in ways indicating he understood them and he  
3 was agreeing to take certain actions in reliance upon those  
4 statements. And the case law is clear that those types of  
5 responses turn the inbound messages into the admissions of  
6 Mr. Jackson for purposes of analysis under 801(d) of the  
7 Federal Rules of Evidence.

8       The case of *United States v. Shulman* lays out the  
9 requirements that there be words or conduct that unambiguously  
10 manifests adoption of the other person's statements. In that  
11 circumstance the content of the statement need not even be  
12 against the declarant's interest.

13       So those are the -- that's the Government's argument here,  
14 your Honor, is that there are timely responses from Mr. Jackson  
15 that result in an adoption of Mr. Jackson of the inbound  
16 messages.

17       I would also argue to the Court, as the Court outlined,  
18 that they're also admissible for context. So even if not being  
19 offered for the truth of their own contents, they are being  
20 offered to render intelligible the defendant's response.  
21 There's case law supporting that concept as well on pages 14  
22 and 15.

23       Finally, your Honor, similarly to what we were just  
24 talking about as far as inquiries are concerned, a third reason  
25 would be that some of these messages are simply questions, a

1 question of whether they can obtain drugs and a certain  
2 particular amount of them. In and of itself, that inquiry  
3 would not be hearsay, consistent with what the Court was just  
4 discussing in relation to the unexpected visitor to the search  
5 warrant location.

6 THE COURT: Mr. Jackson, any response?

7 MR. JACKSON: Yes, your Honor. A lot of these text  
8 messages, your Honor -- I matched a lot of these text messages  
9 with a lot of the evidence that the Government turned over to  
10 me, and there's no corroboration with these text messages. I  
11 have to prove it in front of a jury if your Honor grant it, but  
12 a lot of these text messages I didn't even make, but I did  
13 cross-reference a lot of these text messages with other people,  
14 and a lot of these text messages, like, say, for instance, from  
15 Paul or Sam, other people answered these text messages.  
16 Courtney Schaner clearly said that in a lot of her text  
17 messages, "I have this phone" and da-da-da-da, right -- you  
18 know, and I've matched the time and the dates of these text  
19 messages, so, you know, for me I think it would be highly  
20 prejudicial to introduce these text messages where there's no  
21 corroboration.

22 I can see if the Government's going to call some of these  
23 people to testify to these text messages. I surely didn't  
24 respond to these text messages with these people, you know,  
25 talking about drugs and quantity and things like that, but, you

1 know, if your Honor allows it, I will be introducing  
2 contradictory evidence to that that other people answered these  
3 text messages, and I think the Government know about that from  
4 Courtney Schaner's phone, text messages that she have, and she  
5 clearly say "I have this phone," and a lot of these text  
6 messages was -- other people answered that. I never regularly  
7 had this phone. So -- then, again, I leave it up to the Court,  
8 but --

9 THE COURT: All right. The Government was careful in  
10 its motion, and correctly so, to describe this as messages from  
11 a phone associated with you as opposed to your messages. So  
12 it's obviously fair cross-examination and argument to the jury  
13 that other people had your phone and were answering it.

14 The question is that is there enough evidence for a jury  
15 to find that you were the person who was answering these  
16 messages and this conversation that's going on in the messages  
17 are your adopted admissions or that they're necessary to  
18 complete the conversation, and on that point the Court agrees  
19 that they are, that -- the court in *Shulman* was the most  
20 direct, but it held that a party-opponent adopts a  
21 non-testifying person's statements when they do it "by words or  
22 conduct that 'unambiguously manifests adoption of [the other]  
23 person's statement'; in that circumstance, 'the content of the  
24 statement need not be against his interest.' This includes  
25 discussions and negotiations for the purchase of drugs," and

1 the Government cites *United States v. Woods* from the Seventh  
2 Circuit where confidential informant's statements during  
3 recorded calls were admissible as adopted admissions of the  
4 defendant.

5 In *United States v. Sorrentino*, similarly the court held  
6 that where the Government seeks admissions of a conversation  
7 between a confidential informant and the defendant, and the  
8 defendant's statements are admissible as an opposing party's  
9 statement, the confidential informant's statements are also  
10 admissible when used to render what the defendant said in those  
11 conversations intelligible.

12 So because this is a conversation and there is at least a  
13 reliable factual basis, which the jury may well reject, that  
14 communications coming from Mr. Jackson's phone were actually  
15 from Mr. Jackson, the statements in response are adoptive  
16 admissions. They're necessary to make the conversation  
17 intelligible, and they are admissible. Mr. Jackson may produce  
18 evidence at trial that shows that he did not possess his phone,  
19 these messages were not from him, the recipient didn't even  
20 care who was answering the phone as long as they got what they  
21 wanted, but that is something for trial as opposed to a basis  
22 for excluding this evidence, and on that basis the Court grants  
23 the Government's motion *in limine*, Document No. 208.

24 Our next issue -- and, of course, 208 is granted subject  
25 to authentication. You have to provide a basis for the

1 Court -- or the jury, I should say, to find that a cell phone  
2 belongs to Mr. Jackson, and the Court would have to establish  
3 that it is admissible in trial before we get to the statements  
4 on it.

5 Admissibility regarding co-conspirator statements. This  
6 is Document No. 209. And in order for a co-conspirator's  
7 statements to be admissible, there is a significant body of  
8 evidence, and in our circuit and others, there has to be a  
9 finding by a preponderance of the evidence, that there was a  
10 conspiracy in existence, the declarant was a member of that  
11 conspiracy, the defendant against whom the statement is offered  
12 was a member of that conspiracy, the statement was made in  
13 furtherance of the conspiracy, and the statement was made  
14 during the course of the conspiracy.

15 In deciding whether this is in fact the case, the Court  
16 may consider the statement itself after *Bourjaily v. United*  
17 *States*, a Supreme Court case in 1987. The Government may in  
18 some cases introduce these statements subsequently linking up  
19 all the other factors the Court needs to find, but let's start  
20 with the Government as to how you intend to establish the  
21 prerequisites for the admissibility of a co-conspirator  
22 statement.

23 MR. OPHARDT: Your Honor, the Government intends to  
24 show the prerequisites through -- in part through witness  
25 testimony. The Government intends to offer these messages

1 after the testimony of two individuals who will establish  
2 connections between Mr. Jackson and drug distributors using the  
3 monikers S and Hodge.

4 In addition, there will be testimony in advance of the  
5 admission of David Jordan being the individual who goes out the  
6 window at 55 Killington Avenue, is apprehended shortly  
7 thereafter with a large amount of cash on his person, white  
8 powder on his hands.

9 In addition, there will be testimony from the officers who  
10 executed the search warrant that Ms. Schaner and Ms. Ashline  
11 were both present at the time that the warrant was executed.

12 There will also be testimony about 55 Killington Avenue  
13 being a location where Mr. Jackson's drug trafficking  
14 activities were occurring, Ms. Schaner being the primary tenant  
15 of record at that residence.

16 All of this evidence will establish conspiracy involving  
17 the people in the messages that the Government has outlined in  
18 Document 209.

19 The case law is pretty clear, Judge, that you can  
20 certainly wait to make this determination at trial. The  
21 Government does not have -- given the fact that our  
22 anticipation is that Mr. Thornton won't testify until Thursday  
23 at the earliest, we'll have -- late Thursday, I believe, on our  
24 schedule, we'll have a substantial amount of testimony for the  
25 Court to determine this mid trial if it so chooses, and we can

1 adjust exhibits pretty easily on the fly given the nature of  
2 these exhibits.

3 THE COURT: So you're planning on establishing the  
4 basis prior to the admission of the statements and not linking  
5 up thereafter?

6 MR. OPHARDT: Primarily, your Honor. There will be  
7 additional testimony that comes thereafter in the sense that  
8 Mr. Cruz will be testifying after we're seeking the admission  
9 and Ms. Jones will as well, who will provide additional  
10 testimony regarding certainly Ms. Schaner as well as  
11 potentially other aspects of the conspiracy.

12 If the Court has concerns at the time that we offer them  
13 through Mr. Thornton, we can certainly defer seeking their  
14 admission to the jury and publication until after further  
15 testimony. I think these are the types of exhibits we can lay  
16 the foundation with Mr. Thornton, then seek their admission  
17 prior to Agent Gambone testifying. He would be providing some  
18 information to the jury about the meaning of jargon in some of  
19 the messages, so we would need them admitted and published  
20 prior to that, but this is certainly something the Court can  
21 consider throughout the trial without concern from the  
22 Government.

23 THE COURT: All right. Let me ask you if there's any  
24 agreement between you and Mr. Jackson about using exhibits in  
25 opening statement.

1 MR. OPHARDT: Your Honor, we have not discussed that  
2 with Mr. Jackson. Ms. Cate's providing the Government's  
3 opening, and she does not intend to use exhibits.

4 THE COURT: Okay. So the rule is unless the parties  
5 both consent, we don't use exhibits in opening statements.

6 And let's stay on this issue, which is admissibility of  
7 co-conspirator statements. I could show my hand and tell you  
8 I'm unlikely to rule definitively on this issue until the  
9 testimony unrolls, because it may or may not establish the  
10 requirements set forth by the Second Circuit and others that  
11 there has to be a conspiracy. The members need to include the  
12 declarant and the party against whom the statement is offered,  
13 which would be you, and that the statement was made during the  
14 course of and in furtherance of the conspiracy.

15 Any response from you, Mr. Jackson?

16 MR. JACKSON: Yes. The co-conspirator statements,  
17 from what the Government's provided to me is that, especially  
18 with the third superseding indictment -- unlike the second  
19 superseding indictment where I had co-defendants, basically  
20 they were my co-conspirators, third superseding indictment  
21 don't list any co-defendants, any co-conspirators, except  
22 people who just came off the street or, you know, caught  
23 charges or whatever and all of a sudden they make statements,  
24 and I don't understand how the Government would like to use  
25 expert witnesses to corroborate text messages for a conspiracy.



1 It just -- it behooves me that these text messages will come in  
2 mentioning Hodge and all these other people and Mr. Jordan.

3 Mr. Jordan was a co-defendant at one point. He's not here  
4 now, of course. But from what I understand and from the  
5 evidence that I received is that none of these people were ever  
6 around me, and all of a sudden one person is my co-conspirator,  
7 and his statements -- I don't understand how they're going to  
8 use that to justify these allegations. But, you know, I  
9 guess I'll go with the Court's -- you said you're going to  
10 defer your decision until the Government do what they have to  
11 do, so I guess I'll have to go with that, your Honor, but I  
12 just don't see a co-conspirator statement that -- elicited some  
13 two and a half years later by one witness, who was not a  
14 co-conspirator, about OC, Orlando Cruz, who I haven't seen,  
15 prior to November 23rd, in over two years, so I'm kind of  
16 baffled about that, but, you know, I guess I'll have my chance  
17 on cross-examination depending on what Honorable Judge Reiss  
18 decides.

19 THE COURT: All right. I am going to defer ruling,  
20 and I will wait till the evidence necessary to admit the  
21 statements has been provided. It's not going to be linked up  
22 afterwards.

23 Mr. Thornton would be testifying, I believe, as to what he  
24 found on the phone and what he found on different media  
25 devices. He would not be testifying about whether there was a

1 conspiracy or not. That would have to come from participants.  
2 But it is not necessary "that a conspiracy be charged in the  
3 indictment." The Second Circuit case on that is *United States*  
4 *v. Doulin*, D-O-U-L-I-N, 538 F.2d 466. It's a 1976 case. "Nor  
5 is it necessary that the declarant be charged as a  
6 codefendant," so that's not required. That's *United States v.*  
7 *Jones*, 542 F.2d 186. It's a Fourth Circuit case in 1976.

8 "It is sufficient that there be a joint venture."

9 "The joint venture on which admission of a coadventurer's  
10 statement is based need not be the same one as the charged  
11 conspiracy, if any, and it need not have an illegal objective,"  
12 and that is *United States v. Layton*, 855 F.2d 1388 (9th Cir.  
13 1988).

14 So the requirements, you don't have to have co-defendants.  
15 You don't even have to be charged with a conspiracy for this  
16 evidentiary rule to apply, and under 801(d)(2), a statement is  
17 not hearsay when it is offered against an opposing party and  
18 was made by the party in an individual or representative  
19 capacity or was made by the party's co-conspirator during and  
20 in furtherance of the conspiracy.

21 So I have to find that there was a conspiracy, that it's  
22 offered against you, that both you and the declarant were  
23 members of the conspiracy, and that the statement was during  
24 the conspiracy, so when the statement was made, it was during  
25 the conspiracy and it was in furtherance of the conspiracy.

1 And I'm going to wait till I hear the evidence to make those  
2 findings. The courts are mixed about whether or not it needs  
3 to be formal as to whether the Court makes the findings or  
4 whether or not, as long as the Court is ticking off in the  
5 judge's head, yes, this has been met, that has been met. It's  
6 whether it's sufficient. We're not going to get to much of  
7 that evidence, I'm told, in terms of media, meaning like cell  
8 phones and that, until we get to Mr. Thornton, but we may have  
9 it a little bit earlier in a witness' testimony about jargon.

10 So I'll defer ruling on that, but it will not matter that  
11 you -- you don't have co-defendants in order for the rule to  
12 apply.

13 Our next one is, I believe, Mr. Jackson's motion - let me  
14 make sure - *in limine* to exclude Counts 1, 5, 6, 7, and 8 of  
15 the third superseding indictment. This is Document No. 211.

16 And I'm going to start with you, Mr. Jackson.

17 MR. JACKSON: I think your Honor covered it already  
18 with the conspiracy charges, Count 1, in the Government's  
19 motion *in limine*, I believe.

20 THE COURT: So the way I read your motion was that the  
21 Government was not going to be able to admit sufficient  
22 admissible evidence to support the essential elements of these  
23 counts, and the Government's response is "That's not your job,  
24 Judge Reiss. That's the jury's job." So the sufficiency of  
25 the evidence can be challenged at the close of the Government's

1 case, and I will be asking you if you have any motions at that  
2 time, and we're going to have the jury leave and I'm going to  
3 allow you to ask for a judgment of acquittal, but you're asking  
4 from the Court's perspective for pretrial dismissal of these  
5 counts, but I could be misreading what you want.

6       So go ahead and tell the Court anything that you want to  
7 say about your motion.

8           MR. JACKSON: I agree with what the Court said,  
9 because, like I said, I think most of the things they  
10 covered -- you covered in their motion *in limine*, so I'll leave  
11 it like that, but I'll wait till the end of the Government's  
12 case to make an argument.

13           THE COURT: All right.

14           MR. JACKSON: I think that will be sufficient and  
15 fair.

16           THE COURT: All right. Any response from the  
17 Government?

18           MR. OPHARDT: No, your Honor.

19           THE COURT: All right. The sufficiency of the  
20 evidence is generally for the jury to determine. There is a  
21 time to raise this at trial at the close of the Government's  
22 evidence and also before the case is submitted to the jury.  
23 I -- unlike some judges, I actively ask the parties if there  
24 are any motions because sometimes in the press of trial people  
25 forget to do that, so I will do that in this case as well, but

1 a court generally cannot dismiss a count within a criminal  
2 indictment for insufficient evidence. It can't even ask the  
3 Government for a proffer.

4 Attacks on the weight of the evidence rather than its  
5 admissibility are generally inappropriate for a motion *in*  
6 *limine*, and therefore, the Court will await the presence of the  
7 evidence and advise Mr. Jackson and the Government at the close  
8 of the Government's case whether or not there are any motions,  
9 and then it is up to you to present your evidence at that time.

10 This also includes a challenge, however, to Mr. Brimo's  
11 qualifications as an expert. This is Rule 702. And,  
12 Mr. Jackson, do you want to address that? You point out,  
13 correctly, that in grand jury testimony Mr. Ophardt said that  
14 he was an expert on firearms, and he said he wasn't an expert  
15 on firearms. It's actually the Court that would decide whether  
16 he was an expert and if he could testify, but the Government's  
17 position is he has since acquired whatever evidence he needs at  
18 this point to testify as an expert witness.

19 So let's turn it over to you, because it's your motion.  
20 Anything you want to say about that issue?

21 MR. JACKSON: Yes. I don't believe Agent Brimo would  
22 be an expert witness in this case. Agent Brimo was a part of  
23 this case from the beginning, from since the collection of --  
24 of the evidence and him participating in this case with the  
25 U.S. Attorney's Office and others. To me, he was part of the

1 collection team of evidence when they handed him phones to  
2 search, and I believe there's case law -- I don't have it right  
3 now. I think I forgot it in my van. I'm very sorry about  
4 that. Usually I'd be on point, but . . .

5       You can't be an expert witness and be part of the case at  
6 the same time - I think the Supreme Court disallowed that - as  
7 an agent or a police officer being an expert and being part of  
8 the case itself. I think there's a big distinction with that,  
9 and I believe Agent Brimo, like I said, he made a statement in  
10 the grand jury to Mr. Ophardt that he wasn't an expert. And on  
11 top of that, he's very much been a part of this case, so I  
12 think it would be highly prejudicial for him to be part of the  
13 case and be an expert at the same time, your Honor.

14       THE COURT: Well, let me ask you about that, because I  
15 have not seen that case law, and that doesn't mean that it  
16 doesn't exist, but I'm trying, as you're talking about it, to  
17 think about the policy reasons. So why would there be a  
18 prohibition for somebody who's a police officer involved in the  
19 case from also testifying as an expert witness that "I have  
20 experience with firearms. I know that there are several types.  
21 The reason why, you know, a -- it's called a 9-millimeter is  
22 because it has to do with the caliber of the bullet and the  
23 barrel" or whatever they're going to say. What would the  
24 policy reason be that courts would say, "Oh, no, no, you can't  
25 both investigate the crime and provide specialized testimony

1 about any aspect of it"?

2 MR. JACKSON: I think -- I think there's a distinction  
3 between somebody who would look at the evidence differently as  
4 opposed to somebody who's prosecuting the case. You know, not  
5 to use Mr. Ophardt as an example, but Mr. Ophardt, he will  
6 prosecute a case, but for him to testify --

7 THE COURT: Well, he can't be --

8 MR. JACKSON: Right. Well, he can't testify to it,  
9 so, you know, I look at it in that way: For him to prosecute  
10 the case and then present expert testimony to the evidence, I  
11 think that should come from others. There is case law on that.  
12 I read it, your Honor, and I will get it to the Court and to  
13 Mr. Ophardt as soon as possible. You know, excuse my tardiness  
14 on that, but it's a distinction, and the distinction is that,  
15 you know -- you know --

16 THE COURT: Are you sure that the case law you read,  
17 though, was -- you are absolutely right there's an ethical rule  
18 directly on point: We would never allow a prosecutor to be a  
19 witness in a case that the prosecutor was prosecuting. That  
20 would not happen. You can't do -- an attorney cannot even  
21 participate in a case where he or she may be called as a  
22 witness because of those reasons. You're saying to me, though,  
23 that you think there's case law that says a police officer who  
24 investigated the crime can't provide any --

25 MR. JACKSON: Expert.

1 THE COURT: -- testimony that would qualify as expert  
2 witness testimony.

3 MR. JACKSON: Right.

4 THE COURT: Okay. All right. Let's hear from the  
5 Government.

6 MR. OPHARDT: Your Honor, Mr. Jackson is completely  
7 correct that there are courts that have substantial concerns  
8 over individuals testifying both as fact witnesses and experts.  
9 I believe the Sixth Circuit has recommended that the individual  
10 testify twice instead of once, once as a fact witness and then  
11 the second time as an expert witness.

12 THE COURT: But never in our circuit, is it?

13 MR. OPHARDT: It's not been an issue addressed in our  
14 circuit squarely, Judge. This is why the Government has been  
15 careful to choose experts who do not have underlying factual  
16 knowledge about the case.

17 Agent Brimo was not involved in the search at 55  
18 Killington Avenue, Apartment 2. He does not have any firsthand  
19 knowledge of the events that occurred during that search or the  
20 search of the Ford Explorer. His involvement in the case was  
21 solely to review evidence that had already been seized. He  
22 reviewed the documents; documented their make, model, and  
23 serial number; and provided that information to a different  
24 special agent who at the time was a nexus expert.

25 Agent Brimo has since become a nexus expert himself, but



1 that type of ministerial documentation is not the type of  
2 investigatory work that the Courts are concerned with having a  
3 dual-hatted witness.

4 THE COURT: So because you can recall a witness, that  
5 can't be the reason why they're doing it. So testifying twice,  
6 you could have Agent Brimo testify in the beginning of the case  
7 about something he did and recall him later in the case. Is it  
8 about the same subject matter? So this is news to me, which is  
9 great, learning something new. I'm confident I have not seen  
10 it in our circuit, but that doesn't mean that it doesn't exist.

11 What's the policy reason for doing that?

12 MR. OPHARDT: Your Honor, I think the policy reason  
13 stems from courts declaring someone an expert to the jury,  
14 which is not this court's practice, is my understanding. When  
15 somebody certifies as an expert and the jury is instructed that  
16 they are an expert in a particular field after a voir dire,  
17 that provides an impetus -- excuse me. Not impetus.  
18 -- provides a bit of a, for lack of a better word, halo over  
19 that witness as an expert. My understanding is your Honor does  
20 not do that, so that aspect of the concern I think is largely  
21 mitigated. I want to stress --

22 THE COURT: That makes perfect sense to me, and I  
23 actually think our circuit would find the same thing. So if I  
24 was saying to the jury this is an expert and then he is later  
25 or she is later talking about facts, the jury may weigh the

1 credibility of their testimony differently because the judge  
2 has just proclaimed that person an expert. So that -- I think  
3 our circuit would adopt that as well.

4 MR. OPHARDT: Your Honor, so I think that your  
5 practice to not do that, that drastically reduces the concern.  
6 In addition, Agent Brimo's involvement in this case was not the  
7 type the case law has indicated is problematic to have someone  
8 be providing expert testimony. Where this frequently comes up,  
9 when I used to do racketeering and violent crime prosecutions  
10 with the Organized Crime and Gang Section of the Department was  
11 when we would have people testifying about the existence of a  
12 particular gang and be an expert in gang nomenclature and  
13 tattoos and things like that and then also be the investigator  
14 in that particular case.

15 So what we've typically done is pull in an expert to come  
16 in to testify who has nothing to do with the underlying  
17 investigation. That is why we have Agent Gambone testifying,  
18 your Honor. Agent Gambone had no role in interacting with  
19 Mr. Jackson for controlled purchases. He had no role in a 55  
20 Killington Avenue search warrant. I don't believe he's had any  
21 role even in interviewing any of the witnesses in the case, is  
22 my recollection. So his testimony is untainted by the  
23 underlying investigation. He will simply be coming in to talk  
24 about his understanding of drug jargon. That's an example of  
25 the Government's attempts to bifurcate the roles.

1 Agent Brimo, as I said, had no actual involvement in the  
2 investigation other than the ministerial act of documentation.  
3 His testimony before the grand jury was to relay that nexus  
4 determination of another expert as well as the criminal  
5 histories of both Mr. Jackson and Mr. Watson, who were charged  
6 by the grand jury with being felons in possession of firearms.

7 At the time Agent Brimo was not a nexus expert. He was  
8 actively studying to obtain that nexus certification by ATF,  
9 which explains why he responded the way he did. He wanted to  
10 be clear he had not yet obtained that certification. He since  
11 did. I believe it was in February or March of 2022.

12 So the Government submits that Agent Brimo is sufficiently  
13 qualified as an expert. He did not have any activities in the  
14 underlying case, and it would be problematic to have him be  
15 called as an expert. And finally, any concerns Mr. Jackson has  
16 over that grand jury transcript can be explored during  
17 cross-examination.

18 THE COURT: Mr. Jackson, any response?

19 MR. JACKSON: Yes. I disagree with that, your Honor,  
20 because at the beginning of this case - we're talking about the  
21 ATF agent here - typical protocol, firearms was taken to him  
22 for a nexus report, to him and the other agent. Sorry. I  
23 forget his name. But the phones was also given to the ATF  
24 agent where he did the Cellebrite extraction on these  
25 particular phones. And I'm thinking it's all of them except

1 one. I think -- I think Courtney Schaner's phone went to  
2 Custom and Border Control of the Swanton section, if I'm not  
3 mistaken. I might be wrong, but, you know -- but all the rest  
4 of the phones went to him.

5 So he had direct knowledge of this case. He had hands on  
6 in this case from the beginning, from the beginning of the  
7 case. He testified in the grand jury, and I don't remember all  
8 his testimony, but he did relate to certain things in the case  
9 that was part of the case that I deemed to be investigative  
10 work. So I'm looking at it that he was part of the team, and  
11 now he's being separated to be called as a nexus expert in the  
12 case. So I just think there's a big distinction there, and I'm  
13 thanking Mr. Ophardt for backing me up. First time ever.  
14 Appreciate it, you know.

15 THE COURT: Well, let me ask you about that. He's  
16 backing you up in part.

17 MR. JACKSON: Yeah. In part.

18 THE COURT: But my understanding is what he is  
19 acknowledging in the case law is that if I said to the jury,  
20 "Oh, there's Mr. Brimo. He's an expert witness," and he's  
21 testifying about firearms and nexus and all that other stuff,  
22 and then he gets up on the witness stand and he's like, "Well,  
23 we did a confidential buy and we had somebody outfitted with a  
24 wire," now he's a fact witness, and I've just told the jury  
25 this guy is an expert, and that's going to affect their

1 analysis of his credibility, because the judge just qualified  
2 him as an expert. I typically don't do that in criminal  
3 trials. Sometimes somebody asks me to, but I don't just do it  
4 on my own, and the Government's not going to be asking me to do  
5 that. He does have to be an expert witness to testify, but you  
6 don't have to offer them as an expert if they're otherwise  
7 qualified.

8       The case law that you mentioned, you say that mere  
9 participation in the investigation prevents you from being an  
10 expert witness?

11       MR. JACKSON: Yes. Because it's a distinction.  
12 You're going to testify to one part or the other.

13       THE COURT: But what if you're not going to testify to  
14 the investigation and you're only going to testify as an expert  
15 witness?

16       MR. JACKSON: Well, your Honor, I still think that  
17 would be -- I think it stacks the deck even more. I mean, you  
18 know, 99 percent of all officers get on the stand and say, you  
19 know, "Based on my training and experience," and things like  
20 that, automatically puts them at a certain level of expertise  
21 in that particular situation regardless of what crime it is.  
22 So when you look at the expert testimony, I think that somebody  
23 that's coming from the outside, apart from the case, looking at  
24 it, reviewing the evidence, and stating things to the best of  
25 their knowledge and their expertise about it and presenting

1 that to a jury; but in this particular case, I think Agent  
2 Brimo was a part of the investigating team -- just, you know,  
3 my own observation. I think he was part of the team because he  
4 was in it from the beginning of the case.

5 Homeland Security and Detective Lucia and the guys took  
6 this evidence to him, they explained the case with him, and I  
7 think it's -- you know, I think I have something he wrote  
8 especially about the phones and things like that when he  
9 received them and he was explained what was going on in the  
10 case and things like that, so I think he knew a little bit  
11 more. I think he knew a little bit more -- I think he knows a  
12 lot more about the case than the Government has exerted with  
13 this. You know, I think he was part of the case and not apart  
14 from it.

15 THE COURT: All right. Here is the way I'm going to  
16 rule. I'm going to wait to see your case law. We are not  
17 going to have Agent Brimo both testify as a fact witness and an  
18 expert witness. He isn't going to be allowed to do that. He  
19 is going to be in one category or the other. Because even if  
20 the Court does not declare him an expert witness, the jury is  
21 going to be instructed about expert witnesses in the case.

22 I would like to see the case law that says mere  
23 participation in the investigation disqualifies somebody as an  
24 expert witness, but maybe it exists, but you say that that's  
25 what you read the cases to say.

1 In this particular case, you might open the door to it in  
2 that if he testifies on direct about "This is all I'm talking  
3 about is nexus and firearm and I'm not talking anything about  
4 the investigation and I'm not doing any of this" and you start  
5 asking him about the investigation in your cross, which you're  
6 able to, you may open the door, and then it's on you because  
7 you've opened the door.

8 MR. JACKSON: Right.

9 THE COURT: So in the direct examination, is Agent  
10 Brimo only going to be talking in -- straight in the category  
11 of expert witness?

12 MR. OPHARDT: That's the Government's intent, your  
13 Honor. He'll be discussing going to Rutland City Police  
14 Department I believe on December 15th of 2021; examining the  
15 firearms; documenting their make, model, serial number;  
16 providing a nexus determination on The Judge -- the Taurus  
17 Judge firearm; discussing that they appear to be operable  
18 firearms in his expert opinion.

19 He also will be looking at some photographs from the  
20 search warrant to discuss some holsters that were present at 55  
21 Killington Avenue in a desk drawer.

22 I don't have his expert report in front of me, but -- oh,  
23 he'll also be talking about the Taurus firearm company's  
24 website and the fact that he's been on that website as part of  
25 his duties.

1 That's the Government's recollection of the expert  
2 disclosure, Judge.

3 THE COURT: All right. So subject to Mr. Jackson  
4 providing case law that suggests the mere participation in an  
5 investigation disqualifies you as an expert witness, Agent  
6 Brimo may testify only as an expert witness, not as a fact  
7 witness. He can testify about facts in the course of his  
8 expert witness testimony, but they should be about the subject  
9 matter of the expert witness testimony, not the investigation  
10 at large, his interactions with Mr. Jackson or any of the  
11 co-conspirators. And I will reconsider if the case law  
12 supports disqualifying him because he had some participation in  
13 the investigation.

14 And, Mr. Jackson, was it your recall that the case law was  
15 from the Second Circuit? Was it outside the circuit?

16 MR. JACKSON: No. I think -- I think it was the  
17 Supreme Court case that I read about the disqualification. And  
18 it might have come from the Sixth Circuit, like he said, but I  
19 will check it again. I have it in one of my other folders.

20 THE COURT: Okay.

21 MR. JACKSON: And I'm sorry about that, your Honor.

22 There's one more note I want to bring up too. ATF agent,  
23 he also extracted the Cellebrite from these phones, so I want  
24 to note that for the Court as well. Not Mr. Thornton. I know  
25 Mr. Thornton did some forensic work or whatever, but I'm pretty



1 much a hundred percent sure that he did the Cellebrite  
2 extractions to these phones and outlined a lot of these text  
3 messages. So he was a part of the investigative team, so I  
4 don't know how the Government's going to use Mr. Thornton where  
5 he never used -- or somebody else about the extraction from --  
6 I think it was three or four phones. It was. So ATF did do  
7 that, and they did have them in their custody. I have the  
8 receipts for that. But, you know, I'll let the Court and  
9 Mr. Ophardt figure that out, but I just want to note that for  
10 the Court.

11 MR. OPHARDT: Your Honor, Agent Brimo did not do any  
12 cell phone analysis in the case. ATF Special Agent Matt  
13 Ekstrom did have custody of some phones in the case and did do  
14 some extractions. It's a different ATF agent.

15 THE COURT: Okay. So he did the Cellebrite and Agent  
16 Brimo had nothing to do with that?

17 MR. OPHARDT: That's correct, your Honor.

18 THE COURT: Okay. I found a little bit about the  
19 confrontation clause that you might want to look at, the  
20 interesting issue that Mr. Jackson raised, and it says "The  
21 Confrontation Clause does not require a showing of  
22 unavailability as a condition for the admission of the  
23 out-of-court statements of a nontestifying coconspirator when  
24 those statements otherwise satisfy requirements of Federal Rule  
25 of Evidence 801(d)(2)(E)," and that's what the Government was

1 saying is that there's no confrontation clause with  
2 co-conspirator statements. I don't know if Mr. Rupert could be  
3 considered a co-conspirator, but this is what a U.S. Supreme  
4 Court case said. That was a U.S. Supreme Court case, *United*  
5 *States v. Inadi*, 475 US 387 (1986).

6 "The Confrontation Clause does not require the court to  
7 find that the declarant is unavailable in order to admit  
8 testimony under the spontaneous-declaration and  
9 medical-examination exceptions to the hearsay rule." So that's  
10 *White v. Illinois*, 502 U.S. 346 (1992).

11 And they're not directly on point, but they suggest to the  
12 Court that there is a carve-out for non-hearsay statements in  
13 terms of confrontation clause because they aren't testimonial  
14 because they're not being offered for the truth, and that makes  
15 me think that we may not have a proffer problem, but I will  
16 look at it myself and have you look at it further.

17 Let's now turn to motion *in limine* 226 filed by  
18 Mr. Jackson regarding his proposed exhibits. This includes the  
19 videotape, various other exhibits.

20 And that reminds me that we also need to have a  
21 conversation about whether you're going to have an *Old Chief*  
22 stipulation.

23 MR. OPHARDT: Your Honor, Mr. Jackson has signed a  
24 stipulation.

25 THE COURT: Okay. So I'm going to do this now so that

1 I don't forget it. You do not have an obligation to stipulate  
2 to any fact or to any element of an offense. You have a right  
3 under the constitution to have a jury decide beyond a  
4 reasonable doubt whether or not that standard has been made,  
5 whether that essential element has been stipulated to. So you  
6 need to know that you don't need to enter into a stipulation.  
7 You have a right to have the jury decide whether or not you  
8 have a felony and make that determination based on the  
9 evidence, and if you enter into the stipulation, you are giving  
10 up that jury trial right to have that element decided by the  
11 jury.

12 Do you understand that?

13 MR. JACKSON: Yes, your Honor.

14 THE COURT: All right. So we're going to have that.  
15 Let's start with you on your exhibits, and including the body  
16 cam footage, and let me see what else are the issues raised by  
17 you. There is a document sent to and from you to various  
18 recipients, including CS. It's 36 pages, and there is an  
19 HSI-related exhibit and various other exhibits.

20 I want to say one thing about the HSI exhibit. You made a  
21 pretrial challenge to the authority of the investigating  
22 officers. Since this case is going to trial, you have  
23 preserved that objection for appeal, so you can argue to an  
24 appellate court, "Judge Reiss got it wrong. These people  
25 shouldn't have been allowed to participate because they're not

1 qualified to do so under the applicable law," but we typically  
2 would not have them impeached for that purpose. I'm going to  
3 give you a fair amount of latitude in cross-examination, but  
4 still, you have to follow all the same rules as an attorney,  
5 and it has to be relevant.

6 So let's hear your argument on Document No. 226.

7 MR. JACKSON: Yes, your Honor. As far as HSI goes,  
8 your Honor, you did make a ruling in the suppression hearing  
9 that they're allowed to investigate certain things, but there  
10 were things in the suppression hearing -- you told me before if  
11 your Honor missed certain things, I can bring it to your  
12 attention.

13 It was things in my suppression motion that your Honor  
14 never answered, such as 28 USC 509, the Reorganization Plan of  
15 1973, where Congress and the president took -- abolished the  
16 Bureau of Customs Enforcement's Title 21 authority. They  
17 straight abolished it. They have no more Title 21 authority  
18 within that. Your Honor never answered that.

19 Also, I think -- I strongly believe I raised a Tenth  
20 Amendment claim, which I'm going to use at trial, I would like  
21 to use at trial, for that purpose, that the rights of the  
22 people belong to the people and their respective states. Now,  
23 you did mention one thing in a case I brought forth in the  
24 Vermont Supreme Court. I believe it was -- I'm sorry. I'm  
25 sorry. I forgot the case, your Honor, but I think you know

1 what I'm talking about. And you only mentioned one part of  
2 that case. In that case, the Vermont Supreme Court clearly  
3 stated that the Court will only respect any collection of  
4 evidence from government agencies that's respectively in their  
5 jurisdiction to operate in that way, your Honor, so, you know,  
6 I still strongly believe I have a Tenth Amendment argument that  
7 I want to present to the jury. I don't know if your Honor's  
8 going to let me do it, have that latitude.

9 And then the Government mentioned -- I don't want to jump  
10 all around the place with it, but I believe the Government  
11 mentioned when Mr. Zuchman testified. Mr. Zuchman is an agent  
12 with HSI. He's not a lawyer. He's from -- he's from the  
13 Department of Homeland Security, an administrative agency.  
14 That's what the Department of Homeland Security is. He can't  
15 speak on behalf of the Government, which he did, so -- I mean,  
16 I'm not making an objection to that, but he did do that, and  
17 from my understanding, the only person that can speak for the  
18 United States Government when it comes to matters of law is the  
19 Attorney General and the United States Justice Department, and,  
20 you know, so I'll just leave that there, but I believe that I  
21 should have the right to present that before a jury because I  
22 believe that some violations occurred with that.

23 And, you know, on top of that, you know, they came up in  
24 the apartment under a state search warrant where the Vermont  
25 Supreme Court said they're not allowed to do it. They did it.

1 I presented it. Maybe I didn't present it in a good way, but I  
2 just think your Honor missed that part, and, you know, I'm not  
3 pointing fingers or anything like that, so please don't think  
4 I'm trying to be disrespectful.

5 THE COURT: Believe me, the Court's capable of missing  
6 things. Go ahead and make your argument. Don't worry about my  
7 feelings. I --

8 MR. JACKSON: Okay. All right.

9 THE COURT: I have a tough skin, so don't worry about  
10 that at all. And I mischaracterized this as your motion. It's  
11 really the Government's motion to exclude your evidence.

12 MR. JACKSON: Right. That's what it was. So I  
13 believe I have a strong Ninth and Tenth Amendment argument on  
14 that, and I think I'm missing -- I don't know, you know, if  
15 Mr. Ophardt would have a problem. I still would like to submit  
16 my defense. I don't think I did that. I think I missed that  
17 from the deadline. So I don't know if the Government have a  
18 problem like that, but I would like to submit that to the  
19 Court, my defense to these charges and things like that, but,  
20 yeah, your Honor, I think for the most part --

21 THE COURT: Well, pleading not guilty is your defense,  
22 so --

23 MR. JACKSON: Okay.

24 THE COURT: And the motions deadline is over with.

25 MR. JACKSON: Right.

1 THE COURT: So the Court has extended it at least once  
2 and maybe twice, so we won't be having new motions. That  
3 doesn't mean you can't object at trial or ask for a ruling. Of  
4 course you can do that.

5 MR. JACKSON: Right. But as far as the Homeland  
6 Security goes, your Honor, I think there was constitutional  
7 issues there that the Court didn't answer. I think you  
8 answered two parts of it -- three parts of it, really, where  
9 you said the Court is only -- only have to answer the Fourth  
10 Amendment violation, but I made an argument about the  
11 Fourteenth Amendment. Their investigative work, you said  
12 they're allowed to conduct domestic cases. Anyway, I believe  
13 that's wrong. So, you know, there's about three, four parts in  
14 my suppression motion that your Honor didn't answer, so -- and  
15 the Government was right; I was supposed to submit a  
16 reconsideration motion, which the Court allowed me, said I  
17 could, but I didn't because I felt it was going to go to the  
18 point where your Honor would say, "Okay. Well, let a jury  
19 decide it. Make your argument before a jury." And so I took  
20 that perspective of it. I mean, I didn't take it in a mean  
21 way, but I took it in that perspective of trying to figure out  
22 how the Court operate, how Mr. Ophardt operate, so I looked at  
23 it like that way.

24 THE COURT: All right. Well, that's a strategic  
25 decision by you. I'm going to stick on this point. I'm on

1 Document 226 at page 3, and there's a helpful chart that the  
2 Government set forth of what they're challenging, and one of  
3 the things that caught my eye was obviously the Dambrackas body  
4 cam video. Maybe I can knock off that, because you don't plan  
5 to present three hours of it, correct?

6 MR. JACKSON: No, your Honor. Absolutely not.

7 THE COURT: All right. And that satisfies your  
8 concern, Mr. Ophardt?

9 MR. OPHARDT: It largely does, your Honor. I think we  
10 can handle hearsay issues as they arise, so I think that the  
11 Government's primary concern is three and a half hours of video  
12 to the jury.

13 THE COURT: Okay. Then let's stay on the Government,  
14 and Exhibit E is jail text messages to defendant Jackson, and  
15 let's hear your argument as to why those should be excluded.

16 MR. OPHARDT: Thank you, your Honor.

17 The description name is from the exhibit list provided to  
18 the Government by the defense. I think what's important here  
19 is for the Court to understand that this 36 pages of messaging  
20 includes messaging that Mr. Jackson himself sent. So this is  
21 not just messaging that's inbound to Mr. Jackson. Messaging  
22 that's sent by Mr. Jackson is hearsay. It's hearsay because  
23 they're statements he made out of court. He's not testifying,  
24 he stated previously, and he cannot offer his own statements  
25 even simply to show that they were made. He can't offer them



1 for the truth of the matter asserted. The *Marin* case is on  
2 point with those issues. So Mr. Jackson can't get around  
3 offering sworn testimony by offering into evidence statements  
4 he made outside of court. The statements --

5 THE COURT: Let me ask you a couple questions. One  
6 thing that I have learned to do before an exhibit list gets  
7 back to the jury in the jury room is make sure there aren't  
8 references that shouldn't be. So we don't want "Jail text  
9 messages." What do these messages look like? Does the  
10 Department of Corrections do what they do with phone calls and  
11 have a -- something that shows that they're coming from a jail?

12 MR. OPHARDT: Your Honor, there is a -- it's Defense  
13 Exhibit E. It's a pretty vanilla chart that looks somewhat  
14 like an Excel spreadsheet. The only thing that would really  
15 indicate from my quick review is there's a title on top that  
16 says "Inmate Messages Report." That would be an easy redaction  
17 if that's the Court's concern. There are messages about a new  
18 contact, but they don't say anything about Mr. Jackson's  
19 incarcerative status, his detained status. There's some  
20 references to GTL, but I think only a very informed person  
21 would know that that's the vendor for the prison. So I don't  
22 think that the Court's concerns really jump out from the way in  
23 which they're presented.

24 Mr. Jackson makes statements and people inbound make  
25 statements about his detained status, wishing he was out in the

1 community, him wishing he was out in the community, so -- but I  
2 don't know what in this 36 pages Mr. Jackson is intending to  
3 focus on with the jury.

4 THE COURT: All right. So let's start first with  
5 relevance. Looking through these, the relevance from the  
6 Court's perspective is not necessarily immediately apparent.  
7 So let's hear a proffer as to why this exhibit is relevant in  
8 this case. This is Exhibit E.

9 MR. JACKSON: Yes, your Honor. I'm only planning to  
10 use a couple of them text messages in there, and they're from  
11 witnesses that are going to be taking the stand in this case,  
12 like Ashley Lobdell. I believe the Government's going to call  
13 her. She's on the witness list. And I want to present her  
14 comments that she made to me after the fact and now all of a  
15 sudden, you know, from out of nowhere I put a gun to her head,  
16 you know. So --

17 THE COURT: Okay. So you're going to use them for  
18 impeachment purposes?

19 MR. JACKSON: Yes.

20 THE COURT: And the exhibit -- the whole exhibit  
21 wouldn't be coming in, just the section with regard to that  
22 person?

23 MR. JACKSON: Just the section regarding to the people  
24 I talked to. That's it.

25 THE COURT: Okay.

1 MR. JACKSON: No other text messages. Because they  
2 have the names of them other people on there, so none of them  
3 are on the witness list except Courtney Schaner and Ashley  
4 Lobdell, I believe.

5 THE COURT: And have you and Mr. Behrens created an  
6 exhibit that shows just, like, what you want to use? So we  
7 call it a redaction. This should be the big exhibit. It  
8 wouldn't be impossible to do. We're talking about pages, not  
9 36 pages, where you isolate out what you want to use and  
10 they're not seeing a lot of irrelevant information.

11 MR. JACKSON: That's easy, ma'am. I'll do that.

12 THE COURT: You can do that?

13 MR. JACKSON: Yes.

14 THE COURT: Okay.

15 MR. BEHRENS: We did discuss that. We'll provide  
16 that, Judge.

17 THE COURT: All right. Any objection in light of that  
18 proffer?

19 MR. OPHARDT: Your Honor, I do not have an objection  
20 to Mr. Jackson using the contents of them for purposes of  
21 cross-examination. I think there is a question of whether  
22 extrinsic evidence is appropriately admitted to the jury in the  
23 event of an inconsistency or alleged bias, impeachment --

24 THE COURT: Bias is not subject to that as much. It's  
25 usually a very wide-open cross on bias. So a prior

1 inconsistent statement, we get into whether it's collateral and  
2 whether or not there's extrinsic evidence, but evidence of  
3 bias, if he had a statement from Courtney Schaner who said, "I  
4 think you are the most credible and honest person I've ever  
5 met," I think I would be admitting it.

6 MR. OPHARDT: Your Honor, for clarification,  
7 Ms. Schaner is the defense's witness.

8 THE COURT: I know. I'm just saying that if she  
9 changed her testimony on the witness stand and suddenly she was  
10 an adverse witness and saying something else and he wanted to  
11 impeach her on her bias towards him. So we'll probably take it  
12 up exhibit by exhibit, but it strikes the Court that if it is  
13 with regard to a testifying witness, and he can impeach his own  
14 witness, much of your concerns have gone away.

15 MR. OPHARDT: That's correct, your Honor. And we can  
16 certainly take them up in a more limited fashion when we've got  
17 a more limited exhibit. I do -- that's fine, your Honor.

18 THE COURT: Okay. Now, Exhibit F, Emily Collins'  
19 e-mail to Milleville dated 6/27/23, and let's hear the  
20 relevancy of that -- a proffer on relevancy from you,  
21 Mr. Jackson.

22 MR. JACKSON: Can you repeat that?

23 THE COURT: Sure. It's Exhibit F. It's Emily  
24 Collins' e-mail to Milleville dated 6/27/23.

25 MR. JACKSON: Well, your Honor, it's a bunch of

1 e-mails with the lab reports.

2 THE COURT: Right.

3 MR. JACKSON: And I have major concerns with that,  
4 because I have the U.S. Attorney's Office telling an  
5 independent agency how to weigh the evidence, who to put on the  
6 lab report, and I have over 1,000 pages of lab reports. This  
7 evidence was tested, A, B, C, D, E, over six times, over and  
8 over again. I think in 2022 it was tested two or three times.  
9 In 2023 it was tested two or three times. And then I get the  
10 final examination reports. It said refer back to the first  
11 examination reports, which was almost three years prior; you  
12 know what I mean? So I have a strong objection to these lab  
13 reports for the mere fact that I'm -- your Honor, when it comes  
14 out into evidence, to me it was tampered with.

15 THE COURT: Okay. So you want to show that these  
16 people have had communications that go outside of the lab  
17 reports and that there is some relationship between them.

18 MR. JACKSON: Yeah. Like they became part of an  
19 investigation team.

20 THE COURT: All right. Any objection to Defendant's  
21 Exhibit F with that proffer?

22 MR. OPHARDT: Yes, your Honor. Government's *[sic]*  
23 Exhibit F -- first, your Honor, there are other messaging --  
24 there is other messaging with the lab which the Government is  
25 not objecting to. This is -- we are objecting to particular

1 messages that, from the Government's view, lack probative value  
2 even with the proposed purpose by Mr. Jackson. Ms. Collins is  
3 my legal admin specialist in the office, and she's simply  
4 relaying information to the lab indicating that Mr. Jackson --  
5 well, I only have one page of the proposed exhibit instead of  
6 two, but Ms. Collins is simply relaying that the case is  
7 anticipated to be scheduled for trial, and then we're  
8 requesting the documentation from the lab. This is a request  
9 for discovery. Mr. Rubin Goldberg then responds by attaching a  
10 couple files and saying that the chemist will be providing  
11 additional discovery.

12       Mr. Jackson has all the lab documentation because we sent  
13 this e-mail. This doesn't show anything about alleged  
14 tampering, anything about alleged coaching from our office as  
15 to particular -- about things we want done with the evidence.  
16 This is simply asking for documentation, and it puts the  
17 government -- two government employees who have really nothing  
18 to do with the testing, nothing to do with what needs to be  
19 tested before the jury. It simply creates confusion as to that  
20 issue.

21               THE COURT: Would you agree with me it's an admission?

22               MR. OPHARDT: No, your Honor.

23               THE COURT: Why not?

24               MR. OPHARDT: It's not an admission of a  
25 party-opponent.

1 THE COURT: Well, they're government agents working on  
2 your behalf.

3 MR. OPHARDT: Your Honor, there's substantial case law  
4 on when an admission of a party-opponent applies to the  
5 Government. I'd request some time to brief that issue if the  
6 Court desires.

7 THE COURT: So I think that they have a good chance of  
8 being admissions under the kind of master-servant rules, but  
9 I'll let you do that. I don't see any prejudice, and it's part  
10 of his case. So from the Court's perspective, it's "Put this  
11 trial on your radar. Do you have the chain of custody  
12 reports?" Mr. Jackson wants to use them for a purpose. What  
13 would be the prejudice in introducing these exhibits?

14 MR. OPHARDT: It's distraction. It's confusion. It's  
15 just additional materials for the jury to sift through to find  
16 what matters.

17 THE COURT: All right. I'm going to allow it. I  
18 don't think that there is any prejudice. It may have some  
19 probative value, and according to Mr. Jackson, it's important  
20 to his defense.

21 Let's look at Exhibit H, which is OC to CM text messages.  
22 And, Mr. Jackson, let's start with you.

23 MR. JACKSON: Yes, your Honor. I believe Orlando Cruz  
24 is going to be a witness, and his text messages from Marble  
25 Valley Correctional Facility, I believe Officer Goodrich, had

1 me and him both on his radar because we was there at one point  
2 at one time, together and he was speaking about a case where  
3 him and his girlfriend allegedly got caught up in an assault  
4 and robbery and another girl that we was texting text me and  
5 told me what happened in his particular case, and I said that's  
6 crazy, but I do have those documents because the Government  
7 handed it over to me with that, and I intend to use that as  
8 impeachment purposes on how, you know, he's using a Boo-Bee  
9 get-out-of-jail-free card with the Government to get a good  
10 plea for what they did and just, you know, bring up erroneous  
11 testimony against me, so that was the purpose of that, your  
12 Honor.

13 THE COURT: All right. These documents have  
14 references to you being incarcerated, certainly. I mean,  
15 there's, like, a jail ID.

16 MR. JACKSON: I think there was only one page on that,  
17 your Honor.

18 THE COURT: Okay.

19 MR. JACKSON: There wasn't a whole bunch of pages with  
20 him, but I just want to use that as an impeachment purpose.

21 THE COURT: Okay. The Government's response?

22 MR. OPHARDT: Your Honor, there is a lot of  
23 information in the proposed exhibit, Exhibit H, that is  
24 inadmissible hearsay and does not relate to Mr. Jackson's  
25 proposed purpose. There is a -- first of all, there's a lot of



1 messaging here between Mr. Jackson and Ms. Kasey Misencik,  
2 which is also in the other exhibit, and much better copies of  
3 it. You can't even see the responses from Mr. Jackson or  
4 Ms. Misencik. I don't recall the number of that exhibit.  
5 Exhibit E of the defense, Judge. The message outgoing from  
6 Mr. Cruz to Ms. Misencik, we do not have an issue with that  
7 being used, but you can't read it in this version. There is a  
8 better document the Government has provided, and we can provide  
9 that again to Mr. Jackson that shows that whole communication,  
10 and we do not have an issue with that being used with Mr. Cruz  
11 when he testifies.

12       The rest of the document is statements from a Bureau of  
13 Prisons employee, who is not on the witness list, who is making  
14 conclusions and assumptions from the messaging contents  
15 themselves and speculations as to what is meant. I don't think  
16 that that is admissible to the jury. It's certainly hearsay,  
17 and it's certainly not a party who's associated with the  
18 federal government. It's a DOC employee. So we'd ask that  
19 this e-mail and this proposed exhibit not be used.

20       We can provide Mr. Jackson with the better exhibit of that  
21 message that's dated January 13th, 2022, at 11:56 AM from  
22 Mr. Cruz for his purposes.

23               THE COURT: Isn't that already in Exhibit E? The  
24 better copy?

25               MR. OPHARDT: No, Your Honor.

1 THE COURT: No?

2 MR. OPHARDT: Because that is between Mr. Cruz and  
3 Ms. Misencik.

4 THE COURT: Oh.

5 MR. OPHARDT: So it's not in the subset of Exhibit E.

6 THE COURT: Okay. I have substantial concerns about  
7 pages -- the page with the big "Redacted," and this person will  
8 not be testifying, so why would this page be admissible?  
9 You're going to get a better copy of the message. The  
10 Government doesn't oppose that. Why would we have this  
11 redacted thing from Darrell Goodrich talking about him  
12 monitoring messaging and coming to various conclusions about  
13 who's doing what? Why would that be admissible under the  
14 evidence rules, Mr. Jackson?

15 MR. JACKSON: I don't know why it's redacted, your  
16 Honor, but I don't know if we're talking about the same -- just  
17 give me one second. I only plan to use a very small portion of  
18 this, and that was from Cruz to Ms. Misencik -- yes. And that  
19 was from Cruz to Misencik, and that was on 1/13/22. That's  
20 about the only one I plan to use here. So the rest of that, if  
21 there's anything else, I don't know about. I only meant to use  
22 a certain portion for impeachment purposes.

23 THE COURT: Okay. Take a hard look at Exhibit H,  
24 because the exhibit that shows up at trial needs to have only  
25 admissible things in it. It sounds like it's got stuff in it

1 that you don't even plan on using right now.

2 MR. JACKSON: Well, I presented a small portion. Let  
3 me -- because the paralegal helped me out with this. I had a  
4 very small portion of it, your Honor, so I don't know why it's  
5 all big like that. I don't have it. I probably had it in my  
6 other folder, but it's very small for exhibit list. So it  
7 shouldn't be this big page, the front page from Mr. Goodrich,  
8 the memo.

9 THE COURT: All right. So I'm not suggesting; I'm  
10 telling you --

11 MR. JACKSON: Yes.

12 THE COURT: -- I want you to go through Exhibit H,  
13 figure out what you need. The Government's going to offer you  
14 a better copy of the message that you want to use. And when we  
15 get to trial, which will be soon, that's what the exhibit has  
16 to look like.

17 MR. JACKSON: Okay.

18 THE COURT: Okay?

19 MR. JACKSON: Yes, ma'am.

20 THE COURT: Let's move to I. That's the memo of  
21 understanding between HSI and Rutland Police Department dated  
22 1/7/22. I heard Mr. Jackson's argument about this. I don't  
23 necessarily have a problem with him making a factual record if  
24 he thinks it's important to preserve this for an issue on  
25 appeal. It's not going to change the Court's ruling unless I

1 hear more evidence about it.

2 I wouldn't expect your witnesses to know a whole lot about  
3 it, but let's hear the Government's response.

4 MR. OPHARDT: Your Honor, as we outlined in our  
5 motion, this goes to a legal question for the Court, similar to  
6 a motion to suppress. In essence, Mr. Jackson is seeking to  
7 exclude certain evidence because of the involvement of law  
8 enforcement officers that he doesn't believe were appropriately  
9 involved in the investigation. Determinations of competency of  
10 evidence to be submitted to the jury are for the Court alone.

11 THE COURT: But I'm not hearing him say that he's  
12 going to use it for that purpose. So he's not saying, "I want  
13 to exclude it." He wants to establish what he believes is some  
14 form of factual predicate by introducing these exhibits not  
15 only in the suppression hearing but at trial, and I assume he  
16 wants to ask some questions about "Did you know that this law  
17 was, you know, abolished?" or whatever he's going to be asking  
18 about it. I don't think he's asking that I dismiss the  
19 charges, because we've already been through that.

20 MR. OPHARDT: Your Honor, those questions don't go to  
21 relevant issues for the jury to decide. There is nothing  
22 probative as far as particular elements of an offense that this  
23 jury's going to be tasked with deciding. Relevancy is linked  
24 to materiality as to the charges, and whether or not certain  
25 law enforcement officers were working within their statutory

1 authorities is a question for the Court to decide. The Court's  
2 already going to be instructing the jury that "certain searches  
3 were conducted, and it's not for you to determine whether a  
4 search was appropriate." It's the same type of conception,  
5 simply applied to Mr. Jackson's particular motion and concern  
6 with HSI's authorities.

7 THE COURT: All right. Now I turn to you,  
8 Mr. Jackson. How is this relevant? The issue's going to be  
9 preserved for --

10 MR. JACKSON: The purpose --

11 THE COURT: Let me just finish, because we can't talk  
12 at the same time.

13 MR. JACKSON: I'm sorry, your Honor.

14 THE COURT: You can file an appeal, argue that the  
15 Court got it wrong, but why would we have these documents in  
16 trial if the issue is preserved, and what contested issue that  
17 the jury is going to decide? So remember, I know you know that  
18 the definition is: Does it have some probative value for an  
19 issue that's contested at trial or an issue at trial? What  
20 issue would this jury be considering?

21 MR. JACKSON: The issue they would be considering, my  
22 Tenth Amendment rights in the United States Constitution, and I  
23 feel strongly about this, your Honor, and I respectfully  
24 request that you allow me to present this.

25 These documents that I requested from the Government,

1 which they turned over, clearly states that they do not have  
2 any Title 121 authority. I don't know what type of conclusion  
3 at that particular time or how HSI want to market their law  
4 enforcement authority throughout states now, but the Tenth  
5 Amendment is clear. The rights of the people belong to the  
6 people and to the states respectively, not to the federal  
7 government and its agencies, and that's a strong argument I  
8 would like to present for this jury based on that.

9 I believe there's a Fourth Amendment violation in there.  
10 There's a due process right violated. And there's a Fourteenth  
11 Amendment procedural due process right in there that the jury  
12 should hear about. I'm not doing this to say, like Mr. Ophardt  
13 said, "Oh, the Court should decide this." The jury has a right  
14 to decide has my constitutional rights been violated.

15 THE COURT: No. They won't be doing that in this  
16 case. They would be if you brought a 1983 action, but in this  
17 case they're going to be deciding not guilty or guilty. They  
18 aren't going to be like, "This was a lawful search" or "I think  
19 the Fourth Amendment was violated." That's why we have the  
20 pretrial motions. Those are issues for the Court.

21 So knowing that the jury is not going to make a Tenth  
22 Amendment determination and it's not going to be deciding  
23 whether a search warrant was valid - and in fact, the Court's  
24 going to be instructing the jury, "This is what you're supposed  
25 to be considering: whether or not the Government has proven

1 beyond a reasonable doubt the essential elements of the  
2 charge" - do you still feel that this is necessary to -- and  
3 what would be the probative value if the jury is not going to  
4 make those determinations?

5 MR. JACKSON: That HSI, who was acting under custom  
6 laws, don't have a right to interfere with people's domestic  
7 lifestyle, United States citizens, in their ordinary, everyday  
8 life. They're restricted by Congress, by statute, to certain  
9 areas of law enforcement, so therefore they shouldn't be  
10 probing on United States citizens' constitutional rights  
11 withinside the states. This is the only state where this is  
12 happening at, and it's happening at a broad value.

13 The First Circuit, if you look at the case, I think it's  
14 *Drewniak v. The Department of Homeland Security*, the district  
15 court in that circuit - I think it's Judge Landya. She's a  
16 female judge, Judge Landya - she gave them an injunction not to  
17 be doing this no more, no more searches. The courts, just like  
18 here -- not district court; the state courts over there, just  
19 like here, said, "Any evidence collected by you all will not be  
20 accepted in this court." You know what I mean? So over here  
21 in the state of Vermont, they're continuously doing it. You  
22 know what I'm saying? So I believe it's a civil rights  
23 violation.

24 THE COURT: Okay. There are constitutional issues  
25 that a jury might consider, including whether or not your

1 statements were voluntary. I don't even know if you made any  
2 statements. But I'm going to allow you to use this evidence,  
3 H, J, and K. I'm not sure that it's relevant. I'll know more  
4 when it's being presented. I'm having a hard time  
5 understanding why this is something that the jury would hear as  
6 opposed to the Court, but it's important to your defense, and  
7 I'm going to allow it because I think there is no prejudice to  
8 the Government. There is a potential for confusion of the  
9 jurors, but the Court can clarify that through the jury  
10 instructions.

11 Exhibit 11 -- Exhibit L we have addressed, which is the  
12 body cam video. There's only going to be portions of it  
13 provided from Mr. Jackson.

14 Correct, Mr. Jackson?

15 MR. JACKSON: Say that again, ma'am?

16 THE COURT: This is the Jesse Dambrackas body cam  
17 video, Exhibit L. You're only going to present to the jury  
18 snippets from it, correct?

19 MR. JACKSON: Yes, your Honor.

20 THE COURT: Okay. And that satisfies your concern on  
21 the Government's side?

22 MR. OPHARDT: Largely, yes, your Honor. We may  
23 have -- since we don't know the snippets, we don't know the  
24 hearsay issues. There is hearsay, as we stated in our  
25 response -- or, excuse me, our motion. So once we know which



1 snippets we're dealing with, we'll have a better idea as to  
2 hearsay.

3 THE COURT: I'm not so sure that, for example, in a  
4 traffic stop video I have seen Government splicing out hearsay  
5 from non-hearsay statements. I think it just generally all  
6 comes in and there's not a real redaction of the video.

7 MR. OPHARDT: That could be fine, your Honor. We'd  
8 request a curative instruction that they're not being offered  
9 for the truth of the statements.

10 THE COURT: That it just happened.

11 MR. OPHARDT: Correct.

12 THE COURT: This is what happened. Yes.

13 MR. OPHARDT: We would be okay with that approach,  
14 your Honor.

15 THE COURT: Yes. Okay. You will be tasked with  
16 reminding me to provide that.

17 Exhibit -- Defendant's Exhibit N is a supplemental  
18 affidavit from Ann, looks like, McNeil, and let's hear the  
19 Government's objection first.

20 MR. OPHARDT: Your Honor, this supplemental affidavit  
21 was attached to a search warrant for a Jeep that the Government  
22 obtained a search warrant for when seeking evidence of an  
23 uncharged crime. This relates to the search of a Jeep where  
24 law enforcement believes an individual was transported either  
25 before or after he was killed that was associated with

1 Mr. Jackson. Mr. McNeil is not on either party's witness list.

2 Now Commander Charles Whitehead is on our witness list,  
3 and there is some hearsay in McNeil's affidavit in the second  
4 paragraph, but it all relates to the missing person  
5 investigation, the suspected human blood in the vehicle, and  
6 that law enforcement was concerned there had been attempts to  
7 clean the vehicle and requesting information from crime scene  
8 technicians as to whether or not evidence could still be  
9 obtained.

10 THE COURT: All right. Turning to you, Mr. Jackson,  
11 why would it be in any way helpful to have you connected to  
12 what may or may not be a missing person or an uncharged  
13 homicide?

14 MR. JACKSON: This goes straight to the point of HSI  
15 abuse, and during the course of that investigation - I think I  
16 was incarcerated four months at the time; I think it was  
17 March - the U.S. Government gave me a warrant for a white Jeep  
18 SUV, to which -- there was a warrant requested before that by  
19 Detective Lucia, and I forgot who was the other investigator,  
20 to Honorable Judge Fenster in the Vermont Superior Court. He  
21 denied the warrant. He reminded the officers of Vermont rules  
22 of hearsay. He denied the warrant.

23 As I received the unredacted version -- I never had the  
24 whole warrant. I had a redacted version where I couldn't read  
25 the whole warrant up until recently when the Government

1 provided me, maybe a month ago, with the unredacted warrant  
2 where I could come and read everything, and that's when I found  
3 out that a warrant was requested before that, and that warrant  
4 came to the federal government to Honorable Judge Doyle where a  
5 Homeland Security investigator and Mr. Ophardt went before  
6 Doyle and got a warrant based on Mr. Jackson's drug activity  
7 that he had killed somebody; there's blood and everything else  
8 everywhere. That's -- and the warrant that they received was  
9 given to the same officers that Judge Fenster told, "No, you're  
10 not. You can't search this." And they went ahead and got a  
11 federal search warrant and searched. These same officers who  
12 were denied, local police and state police who were denied  
13 access to the vehicle went and got a federal search warrant and  
14 did the search anyway. I feel that's probative value that this  
15 is abuse of authority.

16 I've been accused -- Judge Reiss, I've been coming to see  
17 you in this courtroom for almost 30 months. I've been accused  
18 of most every vile law there is. Let's start from scratch  
19 here: selling drugs, conspiracy, torture, rape, murder,  
20 kidnapping, everything in the book. Enough is enough. A judge  
21 told them no. I didn't know anything about this white Jeep,  
22 but I was served with a warrant that was heavily redacted.  
23 There wasn't nothing there. Judge Fenster told them no, can't  
24 search the vehicle. They went anyway; Homeland Security Agent  
25 Dornbierer and Mr. Ophardt got a warrant and searched the

1 vehicle.

2       Come to find out, all the witnesses that put me in that  
3 place lied and even said at the conclusion of the  
4 investigation, "Mr. Jackson don't even know this man." I don't  
5 know who Davis is. I don't know who got killed. You know what  
6 I mean? I feel this was abuse of authority, and this should be  
7 introduced as part of this Homeland Security thing that they  
8 just -- "If I can't get it here, we'll go here."

9       THE COURT: All right. Let me hear any response from  
10 the Government.

11       MR. OPHARDT: Your Honor, I think the Government's  
12 concern -- Mr. Jackson, if he wants to use this, I think is  
13 opening a lot of doors, and if he asks our law enforcement  
14 witnesses about why they obtained the search warrant, they have  
15 to be able to answer truthfully. The Court cannot allow this  
16 in while simultaneously excluding testimony about why it was  
17 obtained. We are risking a substantial sideshow as to a  
18 still-open missing person and presumed homicide investigation  
19 of the decedent James Bryant, not Davis. Law enforcement is  
20 still pursuing that investigation. It's uncharged.

21       The warrant -- we're not using anything from the warrant.  
22 We're not using anything from the Jeep. We provided the  
23 warrant to Mr. Jackson so that he would be aware of the  
24 statements made within it by witnesses so that he could make  
25 informed decisions about whether or not to call them to the

1 stand. We did not disclose it because we were intending to use  
2 evidence obtained during those searches.

3 This supplemental affidavit is just a sliver of that  
4 investigation and opens up a complete can of worms as to what  
5 Agent Dornbierer would be allowed to testify to, as to what  
6 Detective Lucia would be allowed to testify to as to that  
7 continuing investigation. And my hunch is that trying to find  
8 a middle ground here will require those detectives and agents  
9 to be largely muzzled about what they were doing and why, which  
10 would create substantial prejudice to the Government under 403.

11 THE COURT: All right. Mr. Jackson, you want to say  
12 something more?

13 MR. JACKSON: Yes, your Honor.

14 THE COURT: Go ahead.

15 MR. JACKSON: I totally disagree with Mr. Ophardt on  
16 that part right there, because as of only recently, I have  
17 received that information. Every witness that they putting on  
18 the stand, from Orlando Cruz to Ashley Lobdell and to all these  
19 people, made accusation and claims that I told them that I beat  
20 some homeless man in the head and left him behind Hannaford's  
21 or some hotel, which was totally false, totally untrue. They  
22 went on a witch hunt.

23 Now, I know it was JB who got killed, and I don't know the  
24 man, and I'm very sorry that happened to them, but Davis is  
25 somebody else that I don't even know. They say that I colluded

1 with him, kidnapped this man, put him in the Jeep, and killed  
2 him and left his body somewhere. These are the same witnesses  
3 who said this, these people that's going to appear before this  
4 court, so now if Mr. Ophardt and the Government got a problem  
5 with opening up a can of worms, I didn't do this. They did.

6 THE COURT: Here's the problem, though, is I have an  
7 obligation to make sure that we have a fair trial, and I will  
8 preserve Defendant's Exhibit N for the record, and you may have  
9 a subsequent constitutional violation claim against various  
10 agents. That's not my business. Not this case. Once we get  
11 into uncharged conduct that includes a homicide, I will not be  
12 able to cure that prejudice. I will not. And so, for  
13 example -- I'm not here to prevent you from doing harm to your  
14 own case. That's your own business. But I do need to make  
15 sure this jury stays on the path and is not speculating about  
16 everything else.

17 And so if you got up in front of the jury, and nothing's  
18 going to stop you from doing it, and saying, "I've been accused  
19 of kidnapping. I've been accused of rape. I've been accused  
20 of murder. These people will make up anything to pin the  
21 charges on me," you have a substantial probability that at  
22 least one juror may be thinking, "Well, did you rape somebody?  
23 Did you kill somebody?"

24 So we don't do that. We don't introduce extremely  
25 inflammatory, prejudicial information that has nothing to do

1 with the charged -- the charges that the jury is going to  
2 decide in a trial. And if it -- if the door is opened by you,  
3 the Government can walk through it and they can ask more  
4 questions about it.

5 But looking at Defendant's Exhibit N, there is nothing in  
6 it that is probative. It's not relevant. I'll preserve it for  
7 the record so you'll have a record that it was offered at this  
8 trial and the Court did not admit it. This is not a murder  
9 trial and it's not a kidnapping trial and it's not a sexual  
10 assault trial.

11 So the Government's motion *in limine* is granted with  
12 regard to Exhibit N subject to the Court's ruling that it will  
13 be preserved in the record before the Court.

14 Now let's go to Exhibit O, e-mails from Alex Zuchman to  
15 Jon Ophardt dated 8/12/20 and 12/12/23.

16 And let's start this time with you, Mr. Jackson.

17 MR. JACKSON: Yes, your Honor. This, again, is with  
18 HSI and how they intend to grow their office through task  
19 forces, through local police and state police. They intend to  
20 flex their authority through the states where I honestly  
21 believe they don't have the authority to do so, and, you know,  
22 just by reading this right here, it tells you. And I just want  
23 to read this certain part, if it's okay with the Court. "HSI  
24 is the second largest law enforcement on the United States  
25 government." They say that. I'm sorry. Excuse me. Let me

1 start from the top.

2 "Jon, I hope all is well. I want to follow up on a couple  
3 of conversations I had recently with both AUSAs and" --

4 (Interruption by the reporter.)

5 THE COURT: So I have this and I've read it and I've  
6 seen it before because, remember, it came up at the suppression  
7 hearing. I'm concerned that the last page of it talks about  
8 the suppression hearing, and I would not have the jury find  
9 that I had suppressed evidence, because that isn't going to be  
10 helpful, or not suppressed evidence for either party. This is  
11 in the court's record, and so what is it going to be useful to  
12 introduce it as an exhibit? So what's the relevance? If it's  
13 in the court's record, it's part of the suppression motion.

14 MR. JACKSON: Well, I think it just shows that they're  
15 trying to flex authority, and I think that's -- you know, that  
16 has a lot of value to it that, you know, they're intervening on  
17 American citizens' lives, and they have that -- you know,  
18 they're not supposed to be a hundred miles away from the  
19 border, and for some reason they're, in the state of Vermont,  
20 as the ultimate police force, against the Vermont Supreme Court  
21 orders.

22 THE COURT: All right. Mr. Ophardt?

23 MR. OPHARDT: Your Honor, we would request that  
24 Exhibit O be redacted from the middle of the page that's 1038  
25 down where -- from Agent Zuchman, it says "Not a problem Jon.



1 Let me know what you need in advance." Everything above that,  
2 the Government does not object to its admission into  
3 evidence --

4 THE COURT: All right.

5 MR. OPHARDT: -- given the Court's ruling on the other  
6 HSI documents.

7 THE COURT: All right. I'll allow that. We don't  
8 want the jury to be hearing about suppression hearings or  
9 anything like that. So the document has to be cut off right  
10 before it says "From: Zuchman, Alex E," and it's dated  
11 September 11th, 2023. Okay?

12 MR. JACKSON: Yes, your Honor.

13 THE COURT: All right.

14 MR. OPHARDT: Your Honor, I apologize. I just noted  
15 that there is another spot too. At the top of the page, it  
16 says "suppression hearing 9/21" in the subject line.

17 THE COURT: Okay.

18 MR. OPHARDT: So we may want a redaction there as  
19 well.

20 THE COURT: We will get one there. Okay. F -- sorry.  
21 P is an e-mail from Wendy Alger dated 3/9/22.

22 Let's start with the Government this time.

23 MR. OPHARDT: Your Honor, it's my understanding  
24 Ms. Alger's been added to the defense's exhibit list, which I  
25 think changes the analysis of this. It is still somewhat

1 confusing that the Chief Deputy State's Attorney in Rutland is  
2 communicating with the laboratory, but I think we can handle  
3 that through our lab witnesses, even without Ms. Alger.

4 THE COURT: All right. So you have dropped your  
5 objection to the admission of Exhibit P?

6 MR. OPHARDT: Yes, your Honor.

7 THE COURT: Okay. That takes us to Exhibit S. Let's  
8 see. R is not a problem?

9 MR. OPHARDT: Your Honor, we are not objecting to  
10 Exhibit R.

11 THE COURT: Okay. R is not a problem. So Exhibit S  
12 is our last one.

13 And let's start with the Government because you're on your  
14 feet.

15 MR. OPHARDT: Thank you, Judge.

16 The issue is not content. The issue is duplication.  
17 Everything that's in Defendant's Exhibit S is also in  
18 Defendant's Exhibit B. Defendant's Exhibit S is simply an  
19 earlier e-mail exchange, which is incorporated into Defendant's  
20 Exhibit B. So I believe it's redundant. It's not a gigantic  
21 403 issue, but I do not think it adds any probative value  
22 because it's in essence duplication.

23 THE COURT: Mr. Jackson, do you agree with that?

24 MR. JACKSON: Yes, your Honor, I agree with that.

25 THE COURT: So we want to cut down on things that the

1 jury has to look at in deliberations, so let's just use Exhibit  
2 B, and S will be excluded as redundant.

3 And I think those are all of our issues, but let me start  
4 with the Government as to whether there are any issues we  
5 didn't cover.

6 MR. OPHARDT: I do not believe so, your Honor. I  
7 think we're set.

8 MR. JACKSON: Yes, your Honor. I believe it's two  
9 subpoenas that I asked for late, one for Miss Wendy Alger and  
10 one Walter Taylor III. I believe calling both of these  
11 witnesses will explain more, because after speaking to  
12 Ms. Denise at the Vermont Forensic Laboratory, I wasn't  
13 satisfied with her analysis, and so since the Government is --  
14 their last lab report, final examination report, is referred  
15 back to December 21st lab report, I think it's relevant for  
16 Ms. Wendy Alger to testify.

17 THE COURT: So I've been signing requests for  
18 subpoenas the day I get them. I can't do it any sooner.  
19 People can file motions to quash and they can say it was served  
20 too late. I take that up if it comes. I haven't had a motion  
21 to quash yet unless it's hit the docket today, but I've been  
22 signing things as soon as I get them from you.

23 MR. JACKSON: Okay.

24 THE COURT: So we'll just -- we'll deal with it in  
25 terms of whether it's going to be a problem or not.

1 MR. OPHARDT: Your Honor, I just want the Court to be  
2 aware, Mr. Jackson to be aware, Ms. Alger has retired.

3 THE COURT: Oh.

4 MR. OPHARDT: She no longer works at the Vermont  
5 Forensic Laboratory, so we -- she's not the type of VFL  
6 employee that we can assist in obtaining her appearance.

7 THE COURT: Okay. I have a preliminary charge. I'm  
8 going to ask my law clerk to get it from chambers. It's just  
9 don't Google, don't look at the Internet, that kind of thing.  
10 I give it in every case. The Second Circuit has approved it.  
11 You can go home with it and see if you have any issues with  
12 regard to it.

13 Anything else that we haven't covered?

14 MR. JACKSON: You already covered the subpoenas, so he  
15 would have to send them to you.

16 THE COURT: So we just need one for -- no, I don't  
17 need one. Mr. Jackson needs one, Mr. Behrens needs one,  
18 Mr. Ophardt needs one, and Ms. Cate needs one. And the rest  
19 are for the jurors. And you don't have to read them all in  
20 here. I will be providing that to the jurors at the beginning  
21 of trial like I do in every other case.

22 Okay. Here are a couple more notes. Is there going to be  
23 a request that we sequester witnesses?

24 MR. OPHARDT: I'm sorry, your Honor.

25 THE COURT: Is there going to be a request that we

1 sequester witnesses?

2 MR. OPHARDT: Yes, your Honor.

3 THE COURT: And so it's mandatory if there's a  
4 request. The Court's going to order that witnesses be  
5 sequestered. That means that other than the case agent and  
6 Mr. Jackson, the witness cannot be in the courtroom before they  
7 testify. Once they've testified, they may remain in the  
8 courtroom even if they're called on rebuttal.

9 Our jury coordinator has e-mailed the parties the  
10 additional juror questionnaires, so those you should have by  
11 now. And I think that's it. Anything else that you wanted to  
12 bring to my attention?

13 MR. OPHARDT: No, your Honor. Thank you.

14 THE COURT: Mr. Jackson, you all set as well?

15 MR. JACKSON: No, not at this time, your Honor.

16 THE COURT: Okay. So you don't have anything  
17 additional?

18 MR. JACKSON: No. I'll straighten it out with  
19 Mr. Ophardt.

20 THE COURT: Okay. And I apologize to the staff and  
21 the CSOs who are here without a break. We kept going strong.  
22 But really, it was a long haul. Thank you for being efficient.

23 (Court was in recess at 3:45 PM.)  
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C E R T I F I C A T I O N

I certify that the foregoing is a correct transcript from  
the record of proceedings in the above-entitled matter.

May 10, 2024

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Johanna Massé, RMR, CRR